TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. 806. 96.

MINNESOTA IRON COMPANY, PLAINTIFF IN ERROR,

vs.

MARK M. KLINE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 5, 1896.

(19,468.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 368.

MINNESOTA IRON COMPANY, PLAINTIFF IN ERROR,

vs.

MARK M. KLINE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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a To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

The petition of Minnesota Iron Company respectfully represents:

That it is a corporation duly organized and doing business under the laws of the State of Minnesota.

That on or about the 9th day of August A. D. 1904, there was entered in and by the supreme court of the State of Minnesota, the same being the highest court of said State, a final judgment in a certain case therein pending between one Mark M. Kline, appellant (plaintiff in the district court, the court of original jurisdiction in said State), and said Minnesota Iron Company, respondent in said supreme court of Minnesota, and defendant in the said State district court, said judgment being in favor of the said appellant.

That in said judgment of said supreme court of Minnesota, and in the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant (respondent in said supreme court), all of which will more fully appear from the assignment of errors herewith submitted and filed, and from the certified transcript of the record in said cause herewith submitted.

That in said cause the validity of a statute of the State of Minnesota was drawn in question, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

Therefore this defendant (respondent in said supreme court of Minnesota) prays that a writ of error may issue in this behalf to the said supreme court of the State of Minnesota, for the correc-
b tion of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

August 9th, 1904.

BILLSON & CONGDON,
FRANK D. ADAMS,
Attorneys for Respondent.

FRANK B. KELLOGG,
Of Counsel.

c Supreme Court, State of Minnesota.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent.

It being proposed by the respondent above named to review by writ of error from the Supreme Court of the United States, the judg-

ment rendered in this cause by the supreme court of the State of Minnesota, on this 9th day of August, A. D. 1904;

It is stipulated that the writ of error in said cause, if issued, shall have like effect as though a supersedeas bond had been filed, such supersedeas bond and also the bond for costs being hereby waived.

Dated August 9th, 1904.

SAMUEL A. ANDERSON AND
ALBERT BALDWIN,
Attorney- for Appellant.

d Supreme Court of the United States.

MINNESOTA IRON COMPANY, Plaintiff in Error,
vs.
MARK M. KLINE, Defendant in Error.

On reading the foregoing petition for writ of error, and the stipulation thereto annexed, and the assignment of errors, and the transcript of the record therewith submitted, the said writ is hereby allowed, supersedeas bond having been waived by the said stipulation.

Dated August 9th 1904.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

e [Endorsed:] Copy State of Minnesota. Supreme court. Mark M. Kline. appellant. *vs.* Minnesota Iron Co. respondent. Petition for writ of error. Order allowing it, and waiver of bond.

f UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you, or some of you, being the highest court of the said State in which a decision could be had in the said suit between Mark M. Kline, plaintiff (appellant in said supreme court of Minnesota), and Minnesota Iron Company, defendant (respondent in said supreme court of Minnesota), wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said Minnesota Iron Company, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 5th day of September A. D. 1904, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of August in the year of our Lord one thousand nine hundred and four.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota,
By LOUISE B. TROTT, *Deputy.*

Allowed by
CHARLES M. START,
Chief Justice.

g [Endorsed:] Supreme Court of the United States. Minnesota Iron Company, plaintiff in error, *vs.* Mark M. Kline, defendant in error. Writ of error.

h The Supreme Court of the United States to Mark M. Kline, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 5th day of September next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Minnesota Iron Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 9th day of August, in the year of our Lord one thousand nine hundred and four.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

i [Endorsed:] Supreme Court of the United States. Minnesota Iron Company, pl'ff in error, vs. Mark M. Kline, def't in error. Citation. Personal service of the within citation this 9th day of August 1904 is hereby admitted at St. Paul Minn. on behalf of the defendant in error. Samuel A. Anderson Albert Baldwin attorneys for defendant in error.

j Supreme Court of the State of Minnesota.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent.

The respondent in this action in the said supreme court of Minnesota (defendant in the district court), in connection with its petition for a writ of error from the Supreme Court of the United States, makes the following assignment of errors, which it avers occurred upon the hearing of said cause in this court, to-wit:

The court erred in holding that although the plaintiff was injured through the negligence of a fellow servant, the defendant was liable in damages by force of chapter 13, General Laws of Minnesota, 1887, entitled "An act to define the liabilities of railroad companies in relation to damages sustained by their employees," and in not holding that the said act if so construed as to be applicable to the injury suffered by the plaintiff, is repugnant to the fourteenth amendment to the Constitution of the United States, as denying to the defendant The Minnesota Iron Company, the equal protection of the laws.

BILLSON & CONGDON,
FRANK D. ADAMS,
Attorneys for Respondent.

August 9th, 1904.
FRANK B. KELLOGG,
Of Counsel.

k [Endorsed:] Supreme court, State of Minnesota. Mark M. Kline. appellant. *vs.* Minnesota Iron Company. respondent. Assignment of errors.

l *Assignments of Error.*

State Supreme Court.

The court erred in ordering or decreeing that judgment be entered in favor of the respondent notwithstanding the verdict in favor of the appellant:

1st. Because the verdict in said action was fully justified and sustained by the evidence.

2nd. Because said verdict was in accordance with the law.

3rd. Because said order directing judgment notwithstanding said verdict was contrary to law.

4th. Because said order directing judgment notwithstanding said verdict was not justified by the evidence, and was contrary to said evidence.

5th. Because the respondent, as shown by said evidence was operating a railroad within the purview and meaning of section 2701 General Statutes 1894, and because the appellant was injured while in the employ of the respondent as a locomotive engineer, and solely because of the negligence of said respondent and while exposed to the peculiar risks and hazards accompanying the operation of a railroad, and because of such risks and hazards.

6th. Because said section 2701 General Statutes 1894 is constitutional and valid, and does not deny to the respondent the equal protection of the laws within the meaning of the fourteenth amendment to the Constitution of the United States.

m 7th. Because said section is valid and is not class legislation under either the Constitution of the United States nor that of the State of Minnesota.

8th. Because the appellant was not guilty of any negligence which contributed as a proximate cause to his injuries, his injuries being caused solely by virtue of the negligence of the respondent, its agents and servants.

1 State of Minnesota Supreme Court, April Term, 1904.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, 11th Judicial District.

MARK M. KLINE, Plaintiff,
vs.
MINNESOTA IRON COMPANY, Defendant.

Summons.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint upon the undersigned at his office, rooms 616–617 New York Life building, St. Paul, Minnesota, within twenty days from the date of the service of his sum-
2 mons upon you, exclusive of the date of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff will apply to the court above named to have the amount he is entitled to recover ascertained by said court or under its direction, and will take judgment against you for the amount so ascertained and for his costs and disbursements herein.

SAMUEL A. ANDERSON,
Attorney for Plaintiff, 616–617 New York Life Bldg., St. Paul, Minnesota.

(Title of Cause.)

Complaint.

The plaintiff in the above entitled action for his complaint states and alleges as follows:

I.

That the above named defendant now is, and that during all the times hereinafter mentioned it was a corporation organized and existing under and pursuant to certain laws of the State of Minnesota with its principal office and place of business in the city of Duluth, county of St. Louis and State of Minnesota, and that during said times its business, among other things, consisted of owning and maintaining iron mines in said county, and of excavating and stripping the surface from said mines and on top of the ore, preparatory to taking the ore, and that in connection with said work of ex-
3 cavating and stripping, and during all of said times, it owned, maintained and operated certain lines of railroad, and that one of said lines of railroad, so owned, maintained and operated by the defendant, was owned, maintained and operated during all of said times in connection with the excavating and stripping of what, during said times, was known, and which now is known as the "Adams mine," situate in said St. Louis county, and at or near Eveleth, and that said line of railroad last above mentioned, during all the times herein mentioned, consisted of two parallel tracks made of iron rails, the same resting upon wooden ties in the usual manner, with side or passing track, switches and the usual appurtenances, and that during said times the defendant owned, maintained and operated, in connection with said line of railroad, cars, engines, propelled by steam, and other appurtenances appertaining to railroad service.

II.

That on the said 20th day of April, 1903, and for several months prior thereto, the said line at Eveleth extended, among other places, from a point at or near said Adams mine, a distance of about one-half mile to the place where the strippings were unloaded from the cars, said place being called the dump. That a passing track, owned, maintained and operated in connection with said line, was situated about midway between said line and the dump, connected thereto at each end by means of a railroad switch. That on
4 said 20th day of April, 1903, and for several months prior thereto, the defendant operated two trains over said line and passing track, each train consisting of about twelve cars and two engines, one engine being coupled to the cars and the other being

known and designated as the pusher, used to assist in moving the cars, when loaded, from the mine to the dump. That there was upon each engine one engineer and one other employé known as brakeman or conductor, and that during all of said times, among other things, it was the absolute duty of said brakeman or conductor to attend to the turning and manipulation of the switches connecting said passing track to the main line, turning the same as occasion required, without any orders or directions from any of said engineers. That, when one of said trains became loaded, it would be pushed to the dump, and that thereupon the engine called the pusher would be run down and stopped upon said passing track, where it would wait until the cars in said train had been unloaded, and had also run in and stopped upon said passing track, and until the loaded train and its engines had run up said main line past the switch nearest to the mine, connecting said passing track with said main line. That it was the duty of said brakeman or conductor with said engine called the pusher, as soon as said engine had stopped upon said passing track to go to and turn said switch and line the same up for the main track, so as to enable said loaded train to pass along said main line to the dump, and to prevent its running along upon said passing track, and that at no time, either as herein mentioned or otherwise was it ever the duty or part of the work of the engineer in charge of said engine to look after the tending or manipulation of said switch or any switch, or to give or issue orders with reference thereto.

III.

That on the 20th day of April, 1903, and for several months prior thereto, the above named plaintiff was in the employ of the defendant for hire as a railway locomotive engineer, employed and engaged in running and operating one of the locomotive engines propelled by steam, and owned, maintained and operated by the defendant along said line of railway hereinbefore referred to at or near Eveleth and said Adams mine, and that on said day and during said times the plaintiff, as such engineer, was engaged and employed in the performance of the usual duties of a locomotive engineer.

IV.

That on the 20th day of April, 1903, the plaintiff herein as such engineer was in charge of an engine known as the pusher upon one of said trains, and that on said day, at about the hour of five o'clock in the afternoon in the usual course of the work, it became the duty of the plaintiff to, and it is alleged as a fact that he did, run his said engine and stopped the same upon said passing track at a distance of about one hundred feet from the switch connecting said passing track with the main line, nearest to said mine. That at that time a part or portion of the machinery of said engine had become out of repair, and required immediate attention and

fixing, and that it then and there became the duty of the plaintiff, and, pursuant to the orders and directions of the defendant he began at once, to repair and fix the same while said engine was waiting for said loaded trains to pass, and that in order to do said repairing, it became and was necessary and proper for the plaintiff to be in a reclining position on the ground by the side of said engine with his arm or arms extended under said engine and the wheels thereof, and that the said brakeman or conductor with said engine knew all of said facts and knew when the plaintiff proceeded to perform said work, and that it then and there became the absolute duty of said defendant by and through said brakeman or conductor to turn said switch as hereinbefore specified, and that said defendant by and through said brakeman or conductor then and there assured the plaintiff that he would at once attend to said duties, and protect the plaintiff, and that the plaintiff then and there, in the due and proper performance of his duties, and while exercising due care and caution, and as soon as his engine stopped proceeded to the repairing of said engine as hereinbefore specified, he believing that said switch would be, and that it had been attended to, and fully relying upon said brakeman or conductor attending to the same.

7 V.

The plaintiff further alleges that it then and there became the duty of the defendant by and through its proper agents and servants to watch and protect said engine which the plaintiff was repairing, and prevent the same from being touched or moved while the plaintiff was in said position, and to warn the plaintiff of any approaching danger, and to prevent any and all cars, engines or trains from coming in and upon said passing track, or touching or moving said engine of said plaintiff, all of which was well known to said defendant, and that while this plaintiff was so engaged in the due and proper performance of his duties, and while he was exercising due care and caution, and without any fault or negligence on his part, and without any notice or warning whatever, the defendant did carelessly, negligently and wrongfully fail and neglect to turn and line said switch up for the said main line, as hereinbefore specified, and did carelessly, negligently and wrongfully back and run said loaded train along and over said switch and along and over said passing track, and against and into the engine under which the plaintiff was working, with great force and violence, thereby causing this plaintiff to be thrown and hurled beneath said engine, crushing breaking and mangling his left arm so that the same had to be and it was thereafter amputated above the elbow, and spraining and injuring the plaintiff's back, hips and ankles, and bruising and injuring him in and about his head and body, all of
8 which was caused solely by reason of the careless and negligent acts and omissions of the defendant as hereinbefore and hereinafter specified.

VI.

The plaintiff further alleges that at said time and place the defendant carelessly, wrongfully and unlawfully by and through its servants and agents, and without any fault or negligence on the part of the plaintiff, failed to turn said switch hereinbefore referred to, and to line up the same for the main line, and carelessly, negligently and wrongfully left said switch open for said passing track, and carelessly, negligently and wrongfully permitted said loaded train to run in and upon said passing track with great force, speed and violence, and to strike and move the engine of the plaintiff as aforesaid while the same was properly standing upon said passing track, and while the plaintiff was in the position hereinbefore specified, attending in the proper manner to the duties imposed upon him.

VII.

And it is further alleged that the engine under and about which the plaintiff was then and there engaged in the performance of his duties at the time of said accident was at a distance of about one hundred feet from said switch, and that the said passing track from said switch to said engine and said engine were at all times in plain view of the defendant's agents upon and about said loaded train,
9 and of the brakemen upon the engines standing upon said passing track, and that had said servants and agents been exercising ordinary care and watchfulness, they could and would have seen, and it is alleged as a fact that they did in fact see, that the said loaded train was improperly leaving said main line, and running in and upon said passing track, and that the plaintiff and his engine were in imminent danger of a collision, and that the plaintiff was not aware of the danger approaching, and that the said defendant then and there by and through its servants and agents negligently and wrongfully, after discovering or after it should have discovered, that said loaded train was running in and upon said passing track, and that a collision was imminent, failed and neglected to stop said train or avoid said collision, although ample time and opportunity existed to have accomplished the same, and negligently and wrongfully failed and neglected to warn the plaintiff or attempt to warn the plaintiff of approaching danger so as to enable him to escape and avoid the same.

VIII.

The plaintiff further alleges that by reason of said injuries so received he was for a long time confined to his bed and to the house lost his arm as aforesaid, was bruised and injured about his head, shoulders and body, and that his back, knees and ankles were bruised, injured and badly sprained, and that his back and one of his ankles have ever since been, now are and as he is informed and

verily believes they ever will be lame, sprained and weak,
10 and that he is forever maimed and deformed and that he has ever since suffered, now suffers and will continue to suffer great pain and anguish in both body and mind, and that he has ever since been and ever will be a helpless cripple, unable to work or engage in his usual or any occupation or employment.

IX.

That at the time of receiving said injuries the plaintiff was of the age of twenty-seven years and was in robust health and had always been well and able bodied, and that he was then earning and capable of earning in his usual occupation as locomotive engineer the sum of, to-wit: eighty dollars per month.

X.

The plaintiff further alleges that at the time of receiving said injuries, and at all times prior thereto, the plaintiff was left-handed, and that his arm and hand so mutilated, crushed and lost was the hand which he usually used in the performance of his work.

XI.

The plaintiff further alleges that by reason of said injuries so received solely by and through the careless, negligent, wrongful and unlawful acts and omissions of the defendant as aforesaid he has been damaged by the defendant in the sum of thirty thousand dollars.

11 Wherefore, the plaintiff demands judgment against the defendant for the sum of thirty thousand dollars, and for his costs and disbursements herein.

SAMUEL A. ANDERSON,
Attorney for Plaintiff,
616–617 *New York Life Bldg., St. Paul, Minnesota.*

(Title of Cause.)

Answer.

Now comes the defendant above named and for its answer to the complaint of the plaintiff herein:

1. Admits that it is, and at all the times mentioned in the complaint was, a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business in the city of Duluth, in said county and State, and that during said times its business consisted of owning, maintaining and operating iron mines in said county, and that incidentally to the conduct of its said business, it was engaged to some extent in excavating

and stripping the surface from certain iron mines in said county, including the Adams mine referred to in the complaint, preparatory to taking out ore; and further answering, denies each and every allegation contained in the first paragraph of the complaint not hereinbefore specifically admitted. And the defendant alleges, that it is a corporation organized for mining, and smelting ores, under
12 the provisions of chapter 28 of the Laws of Minnesota for the year 1876, as amended, without any power to own or operate railroads, and that the socalled railroad referred to in the complaint is a mere narrow gauge and shifting tramway, thirty-six inches between the rails, about half a mile in length, temporarily constructed to facilitate the economic removal of stripping considerable quantities of earth from ore, which the defendant was engaged in mining. That said track is shifted from time to time and place to place as the exigencies of the work of excavation may require; that the vehicles used for the removal of the earth were and are small dump cars of a capacity of about three cubic yards each, of the kind commonly used upon tramways operated by horse power for the removal of earth or other heavy materials for short distances; and that the engines used upon said tramway, although operated by steam, are not of the kind ordinarily used upon steam railroads, but are small dinkey engines weighing only about twenty tons.

2. Admits the allegations of the second paragraph of the complaint, except that it denies that the track and trains therein mentioned were other than the tramway and trains of dump cars hereinbefore mentioned, and denies that the employé upon each of said dinkey engines, other than the engineer, was known as, or called, a conductor, and denies that it was ever the duty, or part of the work of the engineer in charge of said dinkey engine to look after
13 the tending or manipulating of the switch referred to in the complaint, or to give or issue orders with reference thereto.

3. Denies that on the 20th of April 1903, or at any other time, the plaintiff was in the employ of the defendant for hire as a railroad locomotive engineer, or otherwise than as an engineer of one of the dinkey engines aforesaid, or was employed or engaged in running or operating for the defendant any other locomotive or engine than one of the said dinkey engines used in the operation of said temporary tramway; and denies that the plaintiff on said day, or any of the times mentioned in the complaint, was engaged or employed in the performance of the usual duties of a locomotive engineer.

4. Admits that on the 20th day of April, 1903, the plaintiff herein as engineer was in charge of one of said dinkey engines known as the pusher upon one of said dump car trains upon said tramway, and that in the afternoon of said day, in the usual course of the work, it became the duty of the plaintiff to, and that he did, run his said engine and stop the same upon the said passing track at a short distance from the switch connecting said passing track with the main tramway nearest the said mine. Further answering, the defendant denies any knowledge or information sufficient to form a belief as

to the truthfulness of any of the allegations or parts thereof, of the fourth paragraph of the complaint, except such as are hereinbefore specifically admitted or denied.

14 5. Further answering, the defendant denies each and every allegation and part thereof of the fifth paragraph of the complaint, except that it admits that at the time mentioned in the complaint a loaded train was by employés of the defendants, who were fellow servants with the plaintiff run along and over the said switch and passing track and against and into the engine of which the plaintiff was in charge, thereby injuring the plaintiff's arm, and that some portion of the arm was afterwards amputated.

6. Defendant further answering, denies each and every allegation or part thereof contained in paragraph six of the complaint.

7. Further answering, the defendant denies each and every allegation or part thereof contained in paragraphs numbered seven and eleven of the complaint; and as to the allegations contained in paragraphs numbered eight, nine and ten of the complaint, the defendant denies that it has any knowledge or information sufficient to form a belief.

8. Further answering, the defendant alleges that the plaintiff was at the time mentioned in the complaint an employé of the defendants, and that his duties required him to work on and about the surface and in connection with the Adams mine, located near Eveleth, Minnesota; that when the plaintiff entered the employ of the defendant and while he continued therein he well knew the nature and condition of the work which he was employed to do and

15 the manner in which the defendant conducted its business; that the happening of said accident to the plaintiff was one of the usual, open and ordinary risks of his employment, all of which plaintiff well knew and fully realized when he entered into the defendant's employ and while he continued therein, and that the happening of said injuries to the plaintiff in the manner and under the circumstances in which the same were received, was one of the risks and dangers of his employment which he voluntarily assumed when he entered said employ and while he continued therein, and alleges that the injuries received by the plaintiff and referred to in the complaint, were due solely to his own fault, carelessness and negligence, and in no way directly or indirectly to the fault carelessness or negligence of the defendant.

Wherefore, the defendant demands judgment that the plaintiff take nothing in this action, but that the same be dismissed and the defendant have judgment herein for its costs and disbursements.

Duluth, Minn., August 20th, 1903.

BILLSON & CONGDON,
FRANK D. ADAMS,
Attorneys for Defendant, 511 *Lonsdale Bldg.*,
Duluth, Minn.

16 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, 11th Judicial District.

MARK M. KLINE, Plaintiff,
vs.
MINNESOTA IRON COMPANY, Defendant.

This case came on for hearing at the court house in the city of Duluth, in the county of St. Louis and State of Minnesota on Friday, September 18, 1903, at 9:30 o'clock a. m., at the regular September term of said court, before the Hon. Wm. A. Cant, one of the judges of said court, and a jury of twelve.

Appearances: Samuel A. Anderson, Esq., and Albert Baldwin, Esq., for plaintiff; W. W. Billson, Esq., and F. D. Adams, Esq., for defendant.

Proceedings were had as follows:

MARK M. KLINE, called on his own behalf, and being first duly sworn, testified as follows:

Mr. ANDERSON:

Q. Your name is Mark M. Kline?
A. Yes, sir.
Q. What is your age, Mr. Kline?
A. Twenty-seven years old.
17 Q. On the 20th of April last where were you living and working?
A. Living at Eveleth.
Q. This county and State?
A. Yes, sir.
Q. And by whom, if by anyone, were you at that time employed?
A. Minnesota Iron Company.
Q. The defendant in this case?
A. Yes, sir.
Q. And how long have you been working for the Minnesota Iron Company?
A. I went to work some time in November, along the first of November.
Q. 1902?
A. Yes, sir.
Q. And did you work thereafter continuously until the day you were hurt—the 20th of April?
A. Yes, sir.
Q. What were you doing for the defendant?
A. On a locomotive engine.

Q. Were you doing that all the time you were there?
A. Yes, sir.
Q. You operated that engine?
A. Yes, sir.
Q. Where did you run and operate that locomotive engine referred to?
A. Over on the stripping.
Q. What mine?
A. Adams mine.
Q. That work was being done by the defendant?
A. Yes, sir.
18 Q. Where was the Adams mine with reference to Eveleth?
A. Down the lower part of the town.
Q. Right by Eveleth, or in it, as far as you know?
A. Well, I don't think it is in the city of Eveleth.
Q. You say you were engaged in running this engine in connection with the stripping of the mine?
A. Yes, sir.
Q. Tell us what you mean by stripping?
A. That means where they take the dirt off down to the ore and engines and steam shovels work there taking it off—with steam shovels.
Q. That is, they don't go down in the ground, but with a steam shovel they take—they strip the surface off?
A. Yes, sir.
Q. When did you commence on that work?
A. Shortly after I went to work there.
Q. Did you work at that continuously after?
A. Yes, sir.
Q. On the 20th of April to what extent had they excavated this piece of land? How far had the work got in reference to the hole that had been made?
A. They had a track run round the piece—took the dirt out in there in a circle, I should judge a quarter of a mile or more round the piece.
Q. And stripped round the edge of that?
A. Yes.
Q. Outside or inside?
A. Inside.
Q. Was it a considerable depth at that time?
A. Deeper in some places than others.
19 Q. Give us some idea how deep it was?
A. All the way from twenty to forty feet I should judge.
Q. That was to excavate down to a bed of iron ore?
A. Yes.
Q. How did you get this dirt away from the pit; by what means; you say there was a steam shovel to throw the dirt?
A. With cars.

Q. What, ordinarily, was used to convey the dirt from the pit to the place where it was hauled?

A. They had locomotive engines and cars; 12 car trains at the time I was hurt.

Q. In the first place, what did the locomotive engines and cars run on?

A. On rails.

Q. Describe the track as to material and shape and size?

A. Just the same as any ordinary track; sixty pound rails, the same ties; some of them might be a little smaller, but a standard tie; track laid on the ground same as any track.

Q. Do you mean by "any track" any railroad track?

A. Yes, any railroad track.

Q. Go on?

A. The same spikes.

Q. In other words they would put the ties down the same as any railroad track?

A. Yes, sir.

Q. How wide was it; narrow gauge or wide?

20 A. Narrow gauge.

Q. To what point did this track extend that you refer to?

A. From the pit to the dump.

Q. You mean the place where they dumped the dirt from the cars?

A. Yes, sir.

Q. How long a track was that to the best of your recollection?

A. I should judge something over half a mile, or about half a mile at that time.

Q. Go on and tell the jury how you took your cars out so they will see what other track was used in connection with that?

A. There was a track that connected with this track that ran all over the mine.

Q. Just tell us how you took the loaded trains out in doing your daily work there?

A. The shovel was digging in the approach the day I was hurt; they was up out of the pit; one train would be at the shovel and would be loading there while the other train would be at the dump or the passing track; they had a passing track; these trains when they were loaded they would go up to the dump; sometimes, as a rule they would whistle off and go up and pass on the passing track; if they was not in there we waited till they came in——

Q. The engines?

A. Yes, sir; when this loaded train would run up the empties would follow; this empty train that went down would leave the switches lined up.

21 Q. By that you mean leave it for the passing track?

A. Yes, sir; the pusher was supposed to go back and line up the switch for the main line.

Q. Assuming here—in going out to the pit—in going out from the pit with a loaded train how many engines were used?

A. Two engines.

Q. Those engines were faced in what direction?

A. Towards the dump.

Q. And the cars were in front of the engineer of the pusher engine?

A. Yes.

Q. And the pusher was the nearest ta the pit in going out?

A. Yes.

Q. What other employés were there in connection with each train besides the two engineers?

A. The brakeman.

Q. Accompanying each engine?

A. Yes, sir.

Q. When you got down into the pit alone, you didn't load up all the cars at once, did you?

A. No, sir.

Q. How many ears did you load at a time?

A. One at a time; sometimes it would run—they had a three and one-half yard dipper; sometimes when they would get it good and full they would load a car with one dipper, sometimes it took two.

Q. And when the car was loaded there would be a signal to move the train to load another car?

A. The brakeman would give the signal.

22 Q. And so you would move on till you got the twelve cars loaded?

A. Yes, sir.

Q. Did the pusher engineer help in that work?

A. No, sir; not usually; sometimes with a bad hill they would help to spot them.

Q. When the loaded train had reached the dump what was the first thing that the helper engine, or pusher engine, would do?

A. The brakeman, you mean?

Q. Yes, what did the brakeman have to do?

A. He had to couple up sometimes—the engine—and the head engine would uncouple.

Q. And when and under what circumstances would you move your engine after you got to the dump?

A. After it was cut off.

Q. Was there any signal in connection with moving out?

A. Sometimes.

Q. Where did the pusher engine go at this time?

A. Go back into the sidetrack.

Q. Describe this sidetrack or passing track; how long is it?

A. I should judge somewhere about three hundred feet from switch to switch.

Q. How is it connected with the main line?

A. Switches.
Q. What kind?
A. They got these round switches; some call them the ball switch.
23 Q. What they call in railroading an ordinary stub switch?
A. Yes, or ball switch.
Q. Sometimes known as stub switch?
A. Well, that was a stub switch.
Q. And you came down the switch nearest to the dump, what duty, if any, did the brakeman have to perform before you came off on the passing track; what did the brakeman have to do to get you on the passing track?
A. He had to go down and line the switch.
Q. After you had passed over it what was done with that switch?
A. The upper switch.
Q. Yes, towards the dump?
A. He always lined the switch for the passing track for the trains to go by.
Q. So as to let the engine in when it came down?
A. Yes.
Q. What was the first duty of the brakeman when you came in on the passing track and stopped in the clear?
A. Line up the switch.
Q. For what purpose?
A. So the loaded trains could run by to the dump.
Q. Who was your brakeman on the 20th of April?
A. George Churchill.
Q. He is here in court?
A. Yes, sir.
24 Q. What part of the day, what portion of the day on the 20th of April had you been engineer at all on the helper engine?
A. All day.
Q. And you were hurt at what time?
A. Somewhere about five o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. When did you start work?
A. That morning.
Q. What time?
A. Seven o'clock; had my dinner with me.
Q. And how many trips with your engine, round trips, had you made?
A. We had made quite a few trips, quite a big day's work; four hundred cars, about eighteen trips.
Q. And on each occasion did you take the pusher engine down on the passing track?
A. Yes, sir.
Q. What did Churchill have to do?

A. First thing to line the switch.

Q. Did you have any instructions to give him, any orders to do that?

A. No, sir.

Q. You ran your engine on the passing track at the time you got hurt?

A. Yes, sir.

Q. When you came down with your engine that afternoon what, if anything occurred at the upper switch?

A. The brake on the engine had not been working right all day; I didn't have much time; I was kept pretty busy the way
25 the shovel was running; before this trip, or this trip, I don't remember which, I had to stop at this switch and the brake wouldn't work right and I came very near hurting the brakeman; so, I usually stopped there and I tried my brake at the switch; my brake was not right; I just stopped and got down to fix the brake.

Q. At or by the upper switch?

A. Somewhere; I don't remember; right there near the switch.

Q. How long were you there?

A. Not very long; I don't just know how long.

Q. You were speaking of your brake not working; what kind of a brake was that?

A. A steam brake—cylinder like any other brake; there is a turn buckle you had to loosen and take the pin out; that loosened the pin to adjust the brake.

Q. That was operated by steam power?

A. Yes, sir.

Q. Had what were ordinarily called brake shoes?

A. Yes, sir.

Q. How many driving wheels were on the engine?

A. Two on each side.

Q. This engine that you were operating didn't have little, small wheels that we see on ordinary engines?

A. No, sir.

Q. Was there a brake shoe attached to each wheel?

A. Yes, sir.

26 Q. How long were you working at your brake at the upper switch on this afternoon of April 20th?

A. I should judge about ten minutes.

Q. Did you finish fixing your brake there?

A. No, sir.

Q. Why did you quit?

A. Murphy started down off the dump.

Q. Who was Mr. Murphy?

A. He was the engineer on the other train that was dumping; he started down.

Q. And you moved your engine to what place?

A. The other engine was whistling out before I moved; the

loaded train had got loaded down there before Mr. Murphy got off the dump and they were whistling out and I asked the brakeman if he would go down and whistle them down—one whistle——

Q. Tell the jury as near as you can remember how far from the lower switch next to the pit, on the passing track, your engine stopped?

A. I should judge about seventy-five or eighty-five feet.

Q. Your engine was in a position with the rear towards the lower switch?

A. Yes, sir.

Q. How did you get into your engine?

A. From the rear end.

Q. What is there across the rear end of your engine?

A. A foot board.

Q. Does it run clear across?

A. Yes.

Q. How far on each side does the foot board extend?

27 A. Something like two feet I should judge.

Q. Give your best estimate of the length of the foot board?

A. About six feet.

Q. Is there an opening up from the foot board to the engine proper; you can step clear from the foot board into your engine, or is there another step?

A. As a rule they step up on the bumper and climb in.

Q. Where was Mr. Churchill?

A. He was on the foot board, I think.

Q. If he was not on the foot board where else did he ride?

A. On the engine.

Q. So he could step right out; did you notice where Mr. Churchill went?

A. On the foot board when I stopped.

Q. What did you do immediately when you stopped?

A. I had my tools lying on the seat box; I had not got my brake fixed and I got off my engine; I was supposed to have it fixed for the night shift.

Q. Did you have any instructions about that—having your engine in repair?

A. When I went to work—the day man is supposed to have the engine in repair—to keep the engine in repair.

Q. Who gave you those instructions?

A. Mr. Helps or the assistant foreman.

Q. What was Mr. Churchill doing at that time?

A. Standing on the foot board and when I got off the en-

28 gine he started right directly towards the switch.

Q. What did you do or where did you go?

A. I went round on the left hand side of the engine and started fixing my brake.

Q. What position did you have to take with your body in doing that work?

A. I was lying down alongside the engine on my back with my head towards the engine, the way the engine was headed; I was lying down on my back; had to reach through the wheels with this arm to get the bolt out; I had got it out already.

Q. How long were you working there to the best of your knowledge, before the accident, between the time you got down and started to work and the time your engine went over your arm?

A. I should judge we must have been in there close to ten minutes.

Q. Did you see Churchill or have any conversation with him after you got down under there and were working before you got hurt?

A. Yes, sir.

Q. How long was it after you started to work? How long was it before you saw or heard anything of Churchill round the engine again?

A. I should judge about five minutes.

Q. State whether or not you called to Churchill and requested him to assist you at any time?

A. I did call him.

Q. More than once?

A. I called him once; that was all.

Q. Did he respond?

29 A. No, sir.

Q. Where do you suppose he was?

A. I supposed he had not got back from lining up the switch.

Q. By the way, what do they do when they line up the switch; stay there or come back?

A. Come back to the engine.

Q. Now, you were going to repair your engine?

A. Yes, sir.

Q. Now, how long a time was it from the time you started to work there until you called Churchill to help you and he didn't respond?

A. About five minutes.

Q. Did Churchill come back to the engine?

A. Yes, sir.

Q. State how you know that?

A. He asked me about coal and water; most generally take coal and water and have the engine all coaled up and the tank filled with water for the night man.

Q. Did he ask you about taking coal and water at this time?

A. Yes, sir.

Q. Did you say you would?

A. I told him I guessed we would make another trip.

Q. In the meantime when he was asking you about taking coal and water, what became of Murphy and his cars—his train?

A. He started for the dump and when he came down he had some cars off near the switch.

Q. At the time you had a conversation with Churchill
30 about taking coal and water where was Murphy and his engine and train?
A. He was just coming down then.
Q. Where did he run his engine with reference to yours?
A. Right down alongside of mine.
Q. Did you see him when you were working?
A. I see him when he came down.
Q. Where were you?
A. I was fixing my engine.
Q. Lying down?
A. Yes, sir.
Q. Did you request Murphy to help you?
A. Yes, sir.
Q. Did he?
A. Yes.
Q. Did he—state what signal he gave to the loaded train?
A. As soon as he came down in there he blew two whistles.
Q. That meant what?
A. For the loaded train to come out of the hole.
Q. Did Churchill after he asked about water and coal help you?
A. Yes, sir.
Q. What did he do?
A. He was holding up the shoes on the other side.
Q. Which side of the engine was he on?
A. He was on the inside.
Q. Away from you?
A. Yes, sir.
31 Q. Where was Murphy's brakeman?
A. He was taking water.
Q. What is that process?
A. They have a stand pipe; whistle two long whistles when they want water——
Q. Did you at any time when you were under that engine know that the switch was not lined up?
A. No, sir.
Q. What became of the loaded train when Murphy gave the two whistles?
A. They came out and run on the passing track.
Q. Did they strike your engine?
A. Yes, sir.
Q. Did you see the loaded train coming?
A. No, sir.
Q. Did you hear it coming?
A. Yes, sir.
Q. Could you tell by the noise where it was; whether it was on the main track or the passing track?
A. I couldn't tell; I thought by the noise they were on the main track.

Q. Did you have any reason to know they were coming on the passing track?

A. No, sir.

Q. You continued work until your engine was struck?

A. Yes, sir.

Q. Do you know how far it came up?

A. It must have been knocked quite a ways by the way I was lying after and the head wood of the engine followed up far enough to catch me——

32 Q. Could you tell from the crash whether it was a violent blow or not?

A. Yes, it was a violent blow; it knocked the car off the track.

Q. What happened; did the wheel run over your arm?

A. Yes, over my left arm and the head wood caught me and doubled me all up.

Q. For whatever it is worth, were you at that time right or left-handed?

A. Left-handed.

Q. Generally in all things?

A. Yes.

Q. You had your left hand under the engine working at the time?

A. Yes, sir.

Q. Where were you taken after you received the injury?

A. To the hospital.

Q. Where; in Eveleth?

A. Yes, sir.

Q. How long did you remain there?

A. Something like two weeks.

Q. Then where did you go?

A. I went home.

Q. Where was that?

A. In Eveleth.

Q. How long were you laid up before you could get out of the house?

A. I walked on a cane for a couple of months.

Q. You say the head wood caught your body and doubled
33 you up; just describe to the jury, not what the doctor told you, but as far as you know what other injuries you sustained besides the loss of your arm?

A. My back and hip hurt and ankle sprained and my knees wrenched.

Q. How long did your ankle trouble you?

A. Bothers me yet.

Q. To what extent?

A. A good deal if I step and twist it any way at all, or I step off the sidewalk or off a step it bothers me.

Q. Your knee bother you yet?

A. No, sir; well, the knee bothers me some now according to the weather; in rainy weather my knee bothers me some.
Q. Any trouble now with your back and hips?
A. Yes.
Q. In what way?
A. Bothers me all the time.
Q. What do you mean by "bothers"?
A. I have pains in the back.
Q. Continuous pains?
A. Yes, in the morning when I get up I have continuous pains after till I get round.
Q. Is that getting better now?
A. No, sir.
Q. How about your back, stooping over and lifting?
A. I can't lift anything.
Q. Was there anything wrong with your back or knee or ankle or general health at the time you were hurt?
34 A. No, sir.
Q. Were you a strong, healthy, good man?
A. Yes, sir.
Q. You have lost an arm; was that arm lost in the accident?
A. Yes, sir.
Q. Where was it taken off?
A. Above the elbow.
Q. Do you know how far?
A. I think the doctor said two inches above the elbow.
Q. There is no elbow joint left?
A. No, sir.
Q. Where was it amputated?
A. At Eveleth.
Q. How long after you were hurt?
A. I got into the hospital something like six o'clock; there was a fellow hurt the same day I was; they were operating on him and I lay in the hospital I think till ten or eleven at night before they operated on me.
Q. At that time you were conscious?
A. Yes.
Q. Did you suffer any special pain from the injury to you at that time?
A. Yes, sir.
Q. Was that pain very severe at the start or did it come later on?
A. It didn't pain me at the start at all but something like fifteen or twenty minutes after it pained.
Q. What shape was it in after the accident?
35 A. The wheel catched me right at the elbow bone; then the wheel ran right down my arm—and it tore off that elbow bone; then the wheel ran right down my arm—mangled the bone; I think it cut off one of my fingers and just smashed my hand all up.

Q. What were your wages at the time, Mr. Kline?
A. $80.00 a month.

At this point proceedings were adjourned to 2 o'clock p. m., at which time they were resumed as follows:

Q. Going back now, Mr. Kline, to the time you were hurt, will you state to the jury so as to make it clear where the two engines were on the loaded train; I am not sure whether we have that on the record, whether the two engines are together on the rear of the train and the cars all in front?
A. Yes, sir.
Q. About how far was it to the best of your recollection on April 20th from the switch—lower switch—of the passing track to the steam shovel where the train loaded?
A. I should judge it was about close to two blocks.
Q. You say the track was about half a mile or more in length?
A. Yes, sir.
Q. Where is the passing track with reference to the central point of the main line—nearer the dump or nearer the mine?
A. Nearer the dump.
Q. I think you said the passing track was 300 feet long?
36 A. Yes.
Q. Running to the dump can you tell in what direction you were going?
A. I don't know the direction.
Q. As your engine runs out from the pit to the dump, which way does the railroad track that you are running out of curve?
A. Curves to the left.
Q. So if you leave the pit you are going out to the left?
A. No curve till it gets up near the passing track.
Q. It begins to curve before you get to the lower switch?
A. Just before you get to the switch; there is a little curve all along there before you get to the switch.
Q. Do you know anything about the degree of the curve?
A. I don't know anything about that.
Q. About how long, because I want to show what the engineer's position is, about how much was it—the car—were two cars and engines in feet?
A. I should judge about 120 feet.
Q. Upon which side of the engine would the engineer necessarily be on the two engines of the loaded train?
A. On the right-hand side.
Q. That would be on the outside of the curve when they came to it?
A. Yes, sir.
37 Q. What would the engineers on these engines sit on?
A. Some has a seat and some sit on a tool box—made for a seat.
Q. That is on the right-hand side?

A. Yes, sir.
Q. What is on the left-hand side?
A. Coal box.
Q. You didn't have any tender at all?
A. No, sir.
Q. As the loaded train comes up from the pit and just before the head of the train reaches the lower switch can the engineer see the end of his train?
A. No, sir.
Q. Why not?
A. On account of the curve.
Q. That is, the train follows the curve of the track and he can't see round the bend so as to see the end of his train?
A. No, sir.
Q. And coming out with the loaded train where do the brakemen ride?
A. Generally on the coal box.
Q. On the left-hand side?
A. Yes, sir.
Q. Is there where the engineer and fireman stand what they call a cab?
A. Yes.
Q. And so that in front of the cab or engine that permits the fireman and engineer to see ahead?
A. Yes.
38 Q. So you can see ahead—both firemen and engineer can see ahead?
A. We have no fireman.
Q. Brakeman, I mean?
A. Yes, sir.
Q. What was his proper place in the course of doing the work there on the loaded train going out?
A. On the coal box.
Q. What duty, if any, did the brakeman have to do?
A. They had to watch out on their side of the engine to protect the engine and train from danger.
Q. To watch the head of the train?
A. Yes, sir.
Q. For what purpose?
A. There might be a man on the track, the switch might be left wrong and it might be the engineer couldn't see them.
Q. On account of the bend?
A. Yes, sir.
Q. Then their duties required them passing the end of the switch to watch the train?
A. Yes, sir.
Q. To see where they were going?
A. Yes, sir.
Q. No other duties as far as you know or observed?

A. No, sir.
Q. There were two brakemen with the train?
A. Yes, one on each engine.
Q. As the loaded train came out and the head of the train
39 came close to the lower switch what, if anything was there in the way of impediments to prevent the brakemen from seeing the head of the train?
A. Nothing whatever.
Q. That is, they were looking across the belly of the curve and could see the head of the train?
A. Yes, sir.
Q. They could see empties sitting on the side tracks?
A. Yes.
Q. Were they in plain view?
A. Yes.
Q. Would it be possible for the loaded train to pass over on to that track if the brakeman was watching the switch?
A. No, sir.
Q. It is up grade there, isn't it?
A. About two and a half per cent I should judge.
Q. Two and a half feet to the hundred?
A. Yes, sir.
Q. About what weight were those engines, including yours?
A. The engine I run they claimed was a fifteen ton engine.
Q. And what was the weight of the other engines, if you know; were they all fifteen tons?
A. They claimed some of them were twenty tons.
Q. As far as you know from observation, working round them, what would you say would be the weight of one of those cars, empty?
A. Oh, I don't know that.
Q. Give your best judgment, Mr. Kline?
40 A. I should judge they would weigh three tons or more.
Q. What is the load of dirt—three cubic feet?
A. They claim they hold three yards of dirt on an average; that is an average.
Q. Twelve cars on a train?
A. Yes.
Q. What speed did you usually run with your train?
A. Always going pretty fast up there; have to run to get out of there.
Q. About how fast was the usual rate of speed per hour?
A. I should judge they were going ten miles an hour there; probably not that; sometimes they were going faster than others; sometimes we would stall there; sometimes they would have to make a run to get out.
Q. In what distance, running at the speed you mentioned, the ordinary speed of a loaded train, in what distance could that train be stopped in an emergency?

A. Provided they see the switch was wrong?
Q. Yes, in an emergency.
A. About twenty feet.
Q. How long would it take the brakeman, if he saw the train running in on the passng track to notify the engineer?
A. No time—just to give the signal with the hand, or——
Q. How long to apply the brake?
A. All you have to do just to throw her over.

41 Q. Then it would take—have you stated how long these cars are to the best of your recollection—all you stated was the train was 120 feet, in your judgment?
A. Yes, sir.
Q. There were twelve cars in the train?
A. Yes, I think there were 12 cars when I got hurt.
Q. How were those cars coupled?
A. Pin and link coupling.
Q. Tell the jury what that is?
A. A round link where they couple there; they have a hole in this iron here for the pin; put the pin in through the link and couple on the other car just the same.
Q. And these are like the regular pin and link coupling on another railroad?
A. The same thing.
Q. Engines, how were they coupled?
A. With a link coupling.
Q. Cars have brakes or anything to control their action?
A. Not in the pit.
Q. Did they have some that had brakes?
A. Some coal cars had brakes on.
Q. Running them over these tracks?
A. Yes.
Q. Then the only brakes they had to control the action of the train were the brakes on each engine?
A. Yes, sir.
Q. Did these brakes that you used, including yours, have steam chests?

42 A. Yes, sir.
Q. What else did they have that they have on other commercial roads?
A. From the throttle the same as regular locomotive engines.
Q. On a commercial road?
A. Yes, sir.
Q. How many wheels on each car?
A. Four wheels.
Q. Two on each side?
A. Yes, sir.
Q. What other tracks, if any, were connected with this track, constituting the system of the railroad tracks there as near as you can remember; just tell the jury.

A. They had a track connected on to this track between the passing track and the pit that ran all over the mine—to different shafts of the mine.

Q. So as to keep it how far from the pit—midway between?

A. I should judge about that.

Q. How were they connected with the track you were operating on?

A. Stub switch.

Q. In connection with that did they have switch standards or targets?

A. Some of them did have targets.

Q. Did this switch connecting the lower switch with the main line, the passing track, at the lower end?

A. None whatever.

43 Q. Was there anything there to tell by looking at it which way the switch was thrown?

A. No, sir.

Q. How could you tell if you wanted to, 75 feet away?

A. You could tell by looking at the lines—following the lines down.

Q. Do it by a casual glance?

A. I don't believe you could.

Q. You mean you would have to look closely?

A. Yes.

Q. There was nothing to indicate which way the switch was thrown, unless you followed the line with your eye?

A. No, sir.

Q. This track running all over the mine, did that branch to the right or to the left coming out of the pit all the time, up the hill?

A. Branched out from the right-hand side.

Q. Any branches off from that line?

A. Yes.

Q. To what different places and objects did the tracks run—any shops or mines?

A. Got one track running out to the timber yard there and a laggin yard there; then they hauled this timber round the mines to different shafts.

Q. To any great extent?

A. Yes, sir.

Q. Carloads—trainloads at a time?

A. I have seen them have as high as three cars at a time.

Q. Coal yard?

A. Yes.

44 Q. Track running there?

A. Yes, sir.

Q. Various shafts about there—mining shafts?

A. I think they have five or six there.

Q. Numbered one to six?

A. Yes, sir.

Q. Scattered?

A. Yes, one shaft though, I think is worked out—not running.

Q. Were the tracks running, or were they at this time to each shaft?

A. Run to all the shafts except to No. 1; don't think they ran in there; I don't remember.

Q. Taking the whole system how many switches can you recall they had?

A. I should judge from twelve to fourteen.

Q. You have thought it over; give us your estimate of the number of miles in this railroad system, including the one you were operating?

A. I should judge three to five miles.

Q. How many engines did they have; they had four on these two trains; did they have any other locomotive engines there?

A. One engine running round the mines hauling this timber.

Q. Did they have occasion to haul coal?

A. Yes, sir.

Q. State what size the coal cars were?

A. About the same size as these others, I should judge.

Q. During the day and night they were operating these
45 four engines, four engineers, four brakemen?

A. Well, this other engine was not running nights.

Q. I say the four engines?

A. Yes, sir.

Q. State whether there were trackmen keeping the track in repair?

A. A track gang.

Q. About how many men?

A. I should judge 12 or 14 men.

Q. What other men did you have round in connection with the track you were working on?

A. General men working round the shovel and pit, dump men.

Q. About how many men were working round the system there, dump and pit?

A. I should judge about 38.

Q. You made in the neighborhood of twenty trips a day?

A. Depends on what kind of ground the shovel is working in.

Q. Ever work on commercial roads?

A. Yes, sir.

Q. In what capacity?

A. Fireman and switchman.

Q. For what company as switchman?

A. Duluth and Iron Range.

Q. How long?

A. About two seasons.

Q. As fireman with what company?

A. The Northern Pacific.

46 Q. How long did you fire?
A. Part of the fall of '91.
Q. About how long a time?
A. I should judge something like two months.
Q. Have you done other railroad work?
A. Yes.
Q. For what companies?
A. Sparta Iron Company.
Q. How long for them?
A. Worked there all last summer from the 6th of June till I went to work for the Minnesota Iron Company.
Q. In what capacity?
A. Engine foreman.
Q. In the yards?
A. Had charge of the engine crew.
Q. Have you done other railroad work for other companies?
A. I fired there a month; the last month I was there.
Q. Any other companies?
A. Drake and Stratton Company.
Q. How long?
A. About three years.
Q. What were you doing for them?
A. Running locomotive engine.
Q. Same kind of work as for the Minnesota Iron Company?
A. Yes.
Q. Small engine?
A. Yes.
Q. Doing the same class of work?
47 A. Yes.
Q. Ever work on an engine on ore cars, hauling ore cars?
A. I ran extra at Sparta.
Q. In the course of your experience with the N. P., Duluth and Iron Range, Sparta Company, Drake and Stratton, did you become familiar with the signals and modes of operating engines and cars and trains?
A. Yes, sir.
Q. Together with the risks and hazards in railroad operation?
A. Yes, sir.
Q. In what respect do the risks and hazards in the operation of the trains on these iron companies roads differ from ordinary commercial roads?
A. No difference in my opinion.
Q. In operating trains on this track at the Adams mine, did you have a code of signals?
A. Yes.
Q. Were they similar as on other railroad systems?
A. Yes, sir.
Q. Did you have a stop signal?
A. Yes, sir.

Q. What kind of signals were used at night?
A. The same as any other road.
Q. Were engines and cars moved while working for the defendant other than by signal?
A. No, sir.
Q. In order to couple cars together state whether it was
48 necessary to go between them, the defendant's cars.
A. Yes, it was.
Q. They had not these automatic couplers same as on commercial roads?
A. No, sir.
Q. In the best of your judgment what speed could be attained on these engines if they were let out full speed?
A. I should judge they would go 30 miles an hour.
Q. Mr. Murphy had some of his cars leave the track coming down—empties?
A. Yes, sir.
Q. Did that occur very frequently—trains that cars left the track in operating this road?
A. Quite frequently.
Q. What did you have to do with switches while acting as engineer?
A. Nothing whatever.
Q. How long prior to the day you were injured had the defendant been turning this lower switch by means of the brakeman on the pusher when it went in on the passing track—lining it up to the main line?
A. About three weeks I should judge.
Q. Prior to that?
A. They always used to have the brakeman on the train—he would get off and line up the switch.
Q. And what would the train do meanwhile?
A. Stop and wait for him.
Q. How would you start?
49 A. He would come back down on the engine.
Q. How would you start—on signal?
A. Yes, if he signalled.
Q. Would your engine be on that end of the train?
A. On the further end.
Q. You waited till he came down to the engine after he had lined up the switch?
A. Yes, sir.
Q. What directions did you get when defendant changed their system or changed their switch to tell you the system was changed?
A. The brakeman——
Q. You got no orders from anyone in authority?
A. No, sir.
Q. Who were the men that were in charge of the mine—what were

they—the men immediately over you and the rest of the men operating this road?

A. A pit foreman.

Q. Who was above him?

A. The fellow that was on the day I got hurt was James Shea.

Q. I know, but the one above him?

A. Assistant superintendent.

Q. Who was the assistant superintendent at the time you got hurt?

A. Helps.

Q. Who was the regular pit foreman?

A. Dick Lash was my regular foreman, but he was off that day.

Q. And Jem Shea took his place?

A. Yes, sir.

50 Q. And when you spoke of the pit foreman, over what class of men did he exercise authority?

A. Everybody in the pit.

Q. When you were in the pit he would have authority over you then and the brakemen?

A. Yes.

Q. Did he ever give any orders to you?

A. Sometimes.

Q. With reference to switches?

A. No, sir.

Q. Or with reference to your power or authority over brakemen?

A. No, sir; none whatever.

Q. Who hired you?

A. Mr. Helps.

Q. He was assistant superintendent?

A. Yes, sir.

Q. State whether or not it was a frequent occurrence to shift cars from one track to another?

A. Yes, sir.

Q. Did you operate trains over all the systems while you were there?

A. Yes, sir.

Q. What difference was there in a general way of handling the trains—engines—in and about this system of the defendant, as compared with the same class of work on commercial roads, spotting cars?

A. No difference.

Q. And each day you were engaged in the daily work of hauling these trains out to the dump?

A. Yes.

Q. Did you have any occasion to haul various loads of lum-

51 ber, coal laggin and supplies?

A. Yes, sir.

Q. Did they have a roundhouse?

A. Have a roundhouse for just one engine.

Q. They didn't put the four engines in houses?
A. No, sir.
Q. Have a machine shop in connection with the road?
A. Yes, sir.

Cross examination.

Mr. BILLSON:

Q. Mr. Kline, this two and a half per cent. grade that you have mentioned as existing on this track, also exists on the passing track?
A. No, sir; not so much; the grade is down below the passing track; after you got up to the passing track you are over most of the grade.
Q. You mean between the passing track and the pit?
A. From the passing track on to the dump.
Q. Most of the grade was there?
A. No, sir; most of the grade was down at the switch—the lower switch.
Q. Isn't it a fact that that track all the way from the pit up to the dump was substantially a uniform grade?
A. Not so much.
Q. But you say it was not substantially a uniform grade?
A. No, sir.
Q. And the principal grade was between the pit and the
52 power switch.
A. Most grade was there.
Q. How much grade do you think was along the passing track?
A. Oh, I don't know; I should judge one and a half per cent grade.
Q. What day of the week were you injured?
A. On a Monday.
Q. What was going on on the Friday preceding—anything?
A. I don't remember now.
Q. Don't remember?
A. No, sir.
Q. Don't you remember that the steam shovel was moved that day and that there was no work going on in the yard; that would be the second day—or the third day—before you were injured?
A. I don't remember now.
Q. What, if anything, was the rule in regard to making repairs that were not of an urgent nature—repairs that were made by the engineer that were not of an urgent nature; were you at liberty to stop at any time in the day on the main track and make repairs?
A. In case the engine was in such shape I couldn't run I was suppose- to fix that engine.
Q. Suppose it was in such condition you could run it, you could make some little repairs, but there was no urgent necessity for it, was there any rule when they should be made?
A. No, sir; there was not.

Q. Then when were they made in fact?

53 A. A man was supposed to do his work on these engines whenever they needed it; he was supposed to do his work on the side track.

Q. Without any regard to the urgency of the repair, whether it was important, whether it should be done immediately or not?

A. I don't just understand you.

Q. Were you ever instructed that unless some repair was urgent, necessary, important to be made at once, that you should defer it until some resting hour, or until Sunday, or until some time when the steam shovel was moving and the trains not running?

A. No, sir; I was not.

Q. You didn't know of any such rule at all?

A. No, sir.

Q. What was the trouble with your brake that day, Mr. Kline?

A. The brake needed attention; the thread was all out of the turning buckle; it was so tight when you shut the brake there was not play enough there for the shoe to come up to the brake and stop the engine.

Q. How old was this engine?

A. This engine was a new one last winter.

Q. How long had it been in use at that time—at the time of your accident?

A. About three months I should judge.

Q. What did you say was the matter with the turn buckle?

A. The thread there—there was a big turn buckle on there to loosen the brake; it was turned up as tight as it could be;

54 then there is a place there on the engine—three holes there to adjust the brake; to adjust the brake you take up the lost motion in the brake with that pin and then divide the difference up with your turn buckle.

Q. You say you commenced to notice this brake was out of order on Monday morning?

A. It bothered me all day.

Q. Had you run this engine on Saturday?

A. Yes, sir.

Q. All right on Saturday?

A. Yes, sir; in fact, the brake never worked right on any of them engines.

Q. What did you mean when you said it was working all right; you meant as well as usual?

A. Yes, sir.

Q. What time on Monday morning did you notice that?

A. I noticed it towards the afternoon; it was not so bad in the forenoon; I worked on the brake at noon to fix it.

Q. Then you made up your mind as to what the occasion was of the brake being lax or loose?

A. The man preceding me put on some new shoes on Sunday—some new brake shoes—he might not have adjusted the brake right

Q. Who was that man?
A. Pat O'Neill.
Q. You say he put on new shoes that Sunday?
A. Yes, sir.
Q. This week when you were hurt you were running day
55 shift?
A. Yes, sir.
Q. How was it the preceding week?
A. I was working nights.
Q. Do you mean to say you were working nights the preceding week?
A. Yes, sir; I think I was.
Q. Then you worked this Sunday night before you were hurt?
A. Well, I don't know; they changed every two weeks.
Q. Isn't it a fact you don't know whether you were on the night shift that preceding week or not?
A. I am pretty sure I was on the night shift.
Q. But you are not entirely certain, I should judge, by the way you speak it?
A. Yes, I am pretty sure I was on nights; I couldn't swear to it.
Q. You would not swear to it?
A. No, sir.
Q. That is your best impression?
A. Yes, sir.
Q. Who informed you or how did you learn that Mr. O'Neill had put on new brake shoes?
A. I could tell by the shoes that were put on.
Q. You could tell by the shoes?
A. Yes, sir.
Q. And when did you notice first that he had put on new brake shoes?
A. That Monday.
Q. First thing in the morning or later in the day?
A. First in the morning.
56 Q. In putting on these brake shoes to what extent is this brake interfered with or taken to pieces?
A. You have got to loosen the turn buckle.
Q. Would you ordinarily loosen the pin in the equalizing lever—this pin you have referred to?
A. No, sir.
Q. Simply loosen the turn buckle in putting on the shoe?
A. Yes, sir.
Q. Well, suppose you had not stopped there to repair that brake at the time you did, and the place—suppose you had gone on and worked till six o'clock with that engine, whose duty would it have been to repair it?
A. My duty.
Q. You have already said that the man on the day shift was expected to keep the engine in repair?

A. Yes, sir.

Q. And if you had not stopped there on the track and made that repair it would have been your duty, if you thought it required repair, to have done it after six o'clock that night before turning it over to the night foreman?

A. Yes.

Q. I understood you to say on your direct examination that you stopped in the vicinity of the upper switch, at the upper end of the passing track, as you were coming back from the dump?

A. Yes, sir.

Q. That is the first switch you come to?

A. Yes.

57 Q. Did you stop your train there on the main track or on the passing track at the time you commenced to work on the brake the first time?

A. I don't know for sure; it was down below the switch; I don't know whether it was clear or not.

Q. You mean you were on the passing track, but you don't know whether you were far enough along so a train could pass the main track without striking you?

A. Yes, sir.

Q. Isn't it a fact you stopped on the main track before you got to the switch at all and took the pin out of your brake?

A. No, sir; it is not.

Q. The only question in your mind is whether you went far enough along the passing track so as to get out of the reach of a train passing on the main track?

A. I stopped somewhere below that switch; I know that.

Q. What did you do there?

A. Loosened up the turn buckle of the brake.

Q. Now, Mr. Kline, if it was the duty of this brakeman at the earliest possible moment to turn that lower switch, why didn't you go right on down and give him an opportunity to do so before you set him to work on your brake at the upper switch?

A. I knew he had lots of time to go down.

Q. And he had lots of time to go to it when you commenced the second time down near the lower switch?

A. Yes, sir.

58 Q. And you say that when you first stopped near the upper switch, toward the dump, that you worked there on your engine about ten minutes?

A. Yes, sir.

Q. Well, now, Mr. Kline, if it seemed proper to you to keep this switchman there working on your engine for ten minutes——

A. I didn't keep him working on my engine there.

Q. Didn't he help you there?

A. I don't remember whether he did; it was not at my request if he did.

Q. What were you trying to do to your engine on that upper switch?

A. I loosened the turn buckle and was going to take the pin out.

Q. Take the pin out there?

A. No, sir; I said if I had time to fix it before Murphy came down off the dump.

Q. I understand you went to work there at the upper switch, nearest the dump, to fix your brake and that you intended—you expected to be able to loosen the turn buckle and take the pin from the equalizing lever and push that up a notch—put the pin in a new hole—in other words you tried to accomplish right there what you tried to accomplish at the other switch?

A. I didn't know whether I could finish it or not.

Q. You were going to work on it till somebody came along?

A. Yes, sir.

59 Q. Would you be likely to undertake to take that pin out of the equalizing lever and put it into another hole without asking anybody to help you?

A. I could take it out, but couldn't get it in.

Q. Well, then, you are candid enough to admit that you expected your brakeman, whether you asked him or not, to stay there and help you?

A. I didn't expect him; no, sir.

Q. Whom did you expect to?

A. I thought maybe I could put the pin in alone.

Q. Now, Mr. Kline, you thought maybe you could put it in alone?

A. I never had the pin out before; I didn't know how it would go.

Q. You had been running an engine for months?

A. Yes.

Q. Didn't you in order to get that pin back that these brake shoes had to be held up against the wheel in a manner that couldn't possiby be accomplished except by two person at work, unless you went to work and took blocks and blocked them up and take probably three quarters or half an hour to block them up yourself?

A. No, sir.

Q. Isn't it a fact that to get this pin back under any circumstances the shoes have to be held up against the wheels?

A. Sometimes if you have not play enough, sometimes you can do——

60 Q. I infer then what you mean is you went to work on your brake down there near the first switch you came to after you left the dump, not knowing whether you were going to need the services of your brakeman?

A. Yes.

Q. Didn't you expect him to go on foot and turn the switch?

A. I didn't expect him to go and turn the switch there.

Q. You expected him to stay there with you?

A. If he wanted to; he could go where he wanted to.

Q. If it seemed to you right and proper, I say, for you to keep him there while you were fixing your brake for ten minutes, why does it seem to you so improper that when you got down to the other switch he did not immediately start to turn the switch?

A. It was always the occasion when he came down to the lower switch to start right to the switch.

Q. Was it not always the custom when you left the dump to go right down to the switch so the brakeman could turn it?

A. No.

Q. You had a perfect right to loiter and lay up on the way, but as soon as you get to the end of your journey then he has to jump around immediately and turn the switch?

A. According to what a man has to do on the engine.

Q. Tell the jury how far along in fact you did get along with your repairs at the upper switch?

A. I loosened up the turn buckle; that is about all I done.

61 Q. Didn't you take the pin out there?

A. No, sir; I didn't.

Q. And you didn't put it back in the same hole you took it out of?

A. No, sir.

Q. Did it take you ten minutes to loosen up the turn buckle?

A. I don't know.

Q. You have said you were about ten minutes?

A. It took some time to let the train down into the pit.

Q. You have expressed an opinion you were working there ten minutes.

A. Yes.

Q. Is this turn buckle an arrangement with a right-hand and a left-hand thread so that by turning the buckle the brake can be tightened up and loosened?

A. Yes, sir.

Q. What did you turn it with?

A. You can turn it with a wrench if you get the right kind of a wrench; that turns very hard; I had all I could do to loosen it; it took me some time to loosen it.

Q. I think you testified on your direct examination that you worked there until after the man on the engine back of you—who was up on the dump—Mr. Murphy was the engineer in charge of the other engine, the one that you were pushing—this train up on the dump?

A. Yes, sir

62 Q. You came back alone and left him there with the train which he was to bring back after you?

A. I didn't go clear up with him.

Q. Did you work there at your engine at the first switch till he was coming down from the dump?

A. I got out from under my engine and put my tools on the tool box and ran down to the lower switch.

Q. The switch between you and Murphy leading to the side track where you were, if you were on the side track, was still open, was it not; you made this first attempt at repairs on the main track; just after you passed through the upper switch—well, I say that switch that you just passed through was left open, so Mr. Murphy could come through after you?

A. Yes, sir.

Q. That was while you were working on your engine; and when you heard him coming from the dump you got out——

A. I see him start.

Q. Then you got out?

A. I loosened the turn buckle and got on the engine when I saw him.

Q. Then you got on your engine and went along; do I understand you to say—I did understand you to say—am I correct—that you didn't understand yourself to have any responsibility at all with reference to any of the switches?

A. No, sir; I had not; I had nothing to do with the switches.

Q. Was there any part of your duty during which it was your duty to pay any attention to the switches?

63 A. No, sir.

Q. There was not any time of day when it was incumbent on you to notice the switches at all?

A. No, sir.

Q. Why did you think this boy—this young man—who was merely a brakeman on the engine was bound to look out for the switches when you were not?

A. He was brakeman; he had to look out for the switches; I was running the engine.

Q. That is really your understanding—that an engineer has a perfect right to sit on his seat and look out of his window and never think about a switch, but that the menial brakeman had to keep his eyes open when he is driving along in the engine and not merely to turn them, to see whether the switches are turned or not?

A. Yes, sir.

Q. Do I understand you to say—to express the opinion that from the pit—the mine pit up to the lower end of the passing track was about a block, or did you say two blocks?

A. I said about two blocks.

Q. About how many feet do you mean by that?

A. About six hundred feet I should judge.

Q. I think I understand you to say you thought that was a little further than the distance between the upper switch and the dump?

A. I don't just understand.

Q. I understood you to say that distance between the mine pit up to the lower switch was somewhat greater than the dis-

64 tance from the upper switch to the dump.

A. Yes, sir.

Q. So that would be perhaps five hundred feet from the upper switch to the dump; of course I am calling for your general estimate?

A. I don't know just how far it is.

Q. I think you said the passing track was about three hundred feet long?

A. Yes, sir.

Q. Well, now, Mr. Kline, do you mean to testify that in your judgment this little engine, running with twelve loaded cars up a two and a half per cent. grade could—would be likely to get up a speed of ten miles an hour?

A. Yes, I think they could.

Q. How fast were you likely to run coming back?

A. I don't know; about the same; according to the track you are running over.

Q. But about the same you think?

A. Sometimes faster; sometimes not so fast.

Q. Coming back you had to make at least two stops, didn't you? That is, you had to stop when you came to the upper switch in order to have that turned for you to get on the passing track; then you went three hundred feet further and then you had no time to stop again and wait till the other train came up?

A. Yes, sir.

Q. So your down trip was broken up into three sections of three hundred to six hundred feet each; now, did you see Mr. Murphy's cars jump the track?

A. No, sir; I did not.

Q. You say they did jump the track as he came down
65 about the upper switch?

A. They did and he told me—someone had—or the brakeman hollered down "cars off."

Q. Where were you?

A. I was down there fixing my brake then.

Q. When his cars got off?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir; I am.

Q. But you don't know how long they had been off when you heard they were off?

A. He just got off then; couldn't have been off long, because I had just come down there a few minutes before this.

Q. Yes, it had not been long; I understand that; do you recollect who called to you and told you the cars were off?

A. I don't know; somebody hollered that the cars were off; I don't know who it was; it might not have been his brakeman—somebody; I was laying on the ground fixing this brake and I looked up and see him stop there so I thought the cars must be off.

Q. You had gotten down under your engine?

A. I was not under my engine at all, or at any other time.
Q. You had your arm under your engine?
A. Yes, sir.
Q. And it was only your arm?
A. Yes, sir.
Q. You were lying flat on your back reaching up?
A. On my side.
66 Q. You were in between the forward and hind wheels of your engine?
A. Yes, sir.
Q. You were in there taking your pin out, letting down your brake intending to re-adjust it, knowing that Murphy's train was already rolling down the track behind you?
A. Yes.
Q. And when you went under there you didn't anticipate that his cars were going to get off the track; I judge from your language from your insistence on the fact that you didn't go under your engine, you didn't consider your position a dangerous one?
A. No, sir; I didn't; I had reason to believe I was safe there.
Q. You mean you didn't consider it dangerous because you didn't think there was anything that could run into your engine?
A. I knew there was not.
Q. You knew Murphy was coming right down behind you?
A. Yes; I saw them when they stopped there; they hollered the cars was off and I should not have left my arm under there so he should hit me.
Q. But your judgment of what was careful and what isn't is such that you think it was the prudent thing to do to get down in that position and reach under your engine and take out this pin with Murphy's train already rolling down that grade behind you?
A. Yes, sir; I was watching Murphy; I didn't have to leave
67 my arm there and have him hit me.
Q. Well, it was just as much his duty to stop his train before he got to you as it was for Mr. Churchill to turn that switch?
A. Yes.
Q. Why didn't you take it for granted he was going to be careful, and not keep your eye on him as you did in Churchill's case?
A. I was in a position where I could see Murphy much better than I could see the brakeman; I couldn't see Churchill.
Q. Do you mean to tell me that was the reason you didn't find out why the switch was not turned on account of the difficulty or trouble of turning it?
A. No, sir.
Q. You say you picked up your tools before you left the upper switch and put them inside and ran your engine down to the lower end of the passing track; what tools did you have?
A. I had a monkey wrench and I think a nut wrench and a hammer.
Q. Now, Mr. Kline, why didn't you find out from Mr.—from the

brakeman before you called him to help you there down near the lower switch, why didn't you find out whether the switch was set so as to make it safe to make that repair?

A. I don't understand.

Q. Why was it that when you were lying down there near the lower switch at work on your engine you didn't find out whether the switch had been turned before you called away the switchman to come and help you?

68 A. I had every reason to believe the switch was all right; he got off the foot board and started right to the switch; I went on with my repairs.

Q. Is that the way you reason it out?

A. He done it as he had done several times that day.

Q. You mean that you didn't think about it or that you did think about it, but reasoned to yourself that of course he had set the switch?

A. I had every reason to believe he had set the switch; it was his duty to do it and he always done it time and time before that.

Q. Try to answer my question; all I want to get at is the frame of your mind there; I simply want you to understand it; at the time you called him to come and help you did the question arise in your mind as to whether the switch had been turned and did you recall the fact that you had seen him start in that direction and so satisfy yourself that the switch had been turned?

A. Yes.

Q. You thought that over?

A. Yes, sir, I did.

Q. And you concluded from the fact that he had started in that direction it was safe to assume he had gone on and turned the switch?

A. Yes, sir.

Q. It would not have cost anything at all either in effort or otherwise to have asked him?

A. I was in a hurry to get that brake fixed; we are supposed to go down to the shovel on time or we should hear from it.

69 Q. You were pretty badly crowded in undertaking to make that repair at that time and place?

A. No, sir, I was not.

Q. Why, were you so pressed for time that you couldn't while you were making your repair ask him if he had closed the switch?

A. I supposed he had turned the switch; I had every reason to believe he had closed the switch.

Q. That is your best explanation of that; do I understand you to say, Mr. Kline, that you could not from your—what do you call that board that runs across the rear end of the engine?

A. Foot board.

Q. From the foot board of your engine that as you got out or as you sat in your engine, do I understand you to say it would not be

easy for you to see whether the switch, some seventy-five or eighty feet away, was turned or not?

A. It was hard to see; there was no target there.

Q. You think you could see it if you made an effort?

A. You could if you had followed your eye down the rail, I guess you could see it.

Q. So that as you sat there day after day and hour after hour, some eighteen hours a day and waited for the lower train to come down loaded out of the mine pit and come up the grade toward the dump, while you were standing on the passing track, you never upon any occasion deemed it the part of prudence or duty or anything else to observe whether the switch had been actually turned or not?

A. No, sir.

70 Q. No matter what you may have been doing or how idle you may have been?

A. I used to glance around as a man would do sitting in his engine; if a train came up there he would probably take notice of the switch and the way the train was going.

Q. Did these trains of twelve cars just run back and forth there day after day without any making or unmaking of trains except perhaps as some car might give out or require repair or something of that kind?

A. We would have to set out cars sometimes in bad order and broke down; set out those that went off the track in bad order.

Q. But except in case of casualties of that kind the two twelve car trains just ran back and forth day after day without being uncoupled or handled by the brakemen?

A. When they wanted to set out a car they would uncouple.

Q. Did they set out a car except in case of some accident of some sort?

A. Not unless it was in bad order or something of that kind.

Q. What do you mean by that?

A. A car that was in bad order.

Q. But a car that was in good order—yes, that is what I say—you say there was a machine shop?

A. Yes, sir.

Q. The shop you refer to is a machine shop of the Adams mine, isn't it?

A. Yes, sir.

71 Q. The mine machine shop?

A. Yes, sir.

Q. And they made there any necessary repairs on the engines or cars or anything of that sort?

A. Yes, sir.

Re-direct examination.

Mr. ANDERSON:

Q. When you stopped your engine at the upper switch you understood Mr. Murphy was unloading a train at that time?

A. Yes, I did.

Q. And you thought you could make repairs there while he was doing that work?

A. Yes.

Q. Did you say something happened to the brake causing it to jerk?

A. I said either the trip before this—I don't remember—the brake didn't work so I stopped; I had to use my brake there and I noticed it was not working right.

Q. There was no way of stopping your train or engine without using the brake?

A. No, sir, not soon.

Q. Could that loaded train come out of the pit and pass the switch without you seeing the engines were not in on the passing track?

A. No, sir.

Q. You were asked a question whether you expected Churchill to go up to close the switch, was there any occasion at that time for you to go down when you stopped at the upper switch?

72 A. No, sir.

Q. Why not?

A. He had lots of time to close the switch after we got to the lower switch.

Q. Then you reasoned that he would have time to do that before the empties came in after?

A. Yes, sir.

Q. You have been asked a question as to whether there was any setting out or uncoupling cars in these trains; if there was an accident or a car was injured you would uncouple and set it out and set other cars in?

A. The brakemen would.

Q. Is there anything of coupling or uncoupling cars in the various tracks from day to day in moving supplies, coal, laggin &c.?

A. Yes, there is all kinds of that work over on the other line.

Witness excused.

GEORGE W. CHURCHILL, called on behalf of the plaintiff and being first duly sworn, testified as follows:

Mr. ANDERSON:

Q. How old are you?

A. Twenty years old.

Q. Where do you live?

A. Eveleth.

Q. This State?
A. Yes, sir.
Q. I believe that you are employed by The Minnesota Iron Company, the defendant?
73 A. Yes, sir.
Q. And were at the time of the accident to Mr. Kline?
A. Yes.
Q. Do you remember when you went to work for the defendant, Minnesota Iron Company?
A. I went to work for them about the 5th of January.
Q. When did you go to work at the stripping?
A. 24th or 25th of March.
Q. Acting as brakeman there something like a month when the accident happened?
A. Yes, sir.
Q. How long on Kline's engine?
A. I had been with Mr. Kline all the time.
Q. State to the jury as well as you can what your duties were?
A. Had to give signals and spot cars, throw the switches, take coal and water and then we had to wipe the engines.
Q. Upon whose signal, order or direction in the course of handling the train did the engineer move?
A. When I gave him a signal.
Q. When you were down there loading under whose control was the train when you wanted a car spotted?
A. Under the brakeman.
Q. The engineer watched you?
A. Yes.
Q. When the switch was to be turned whose duty was it?
74 A. The brakeman if there was not a switchman at the switch.
Q. On the day of the accident you were the brakeman on the helper or pusher engine of which Mr. Kline was engineer?
A. Yes, sir.
Q. Do you remember how many trips you made before the accident occurred?
A. I don't just remember; between fifteen and twenty.
Q. Did the pusher engine during each of these fifteen or twenty trips come back in the passing track and wait?
A. Yes.
Q. What was your first duty after the engine came in the passing track?
A. Line up the switch for the main line.
Q. Had you been doing that each time on the day the accident occurred?
A. Yes, sir.
Q. What orders or directions did you ever receive or expect with reference the handling of the switches from the engineer—turning that switch?

A. Never said anything to me.

Q. Did you ever receive any from your superiors to take orders from the engineer with reference to the switches?

A. No, sir.

Q. Did you ever observe that the engineer had any authority with reference to the switches at all?

A. No, sir, I never did.

75 Q. State whether or not you turned the switch that afternoon to let the loaded train pass by the track or not?

A. I neglected to throw the switch.

Q. Do you know what was the occasion of your neglecting it?

A. No, sir, I do not.

Q. State whether or not you had full time and opportunity after the engine came down and stopped at the lower switch to go down to perform that duty?

A. I had plenty of time before the train came.

Q. Were you requested while the engine was at the lower switch to assist him—to assist Kline—in setting the shoe brake?

A. After I had been down there five or six minutes he asked me to hold the brake shoe.

Q. What did you say to him prior to that?

A. It was about five in the afternoon; I asked him if we should take water and fill up for the night; he said no, he wanted to fix the brake.

Q. Do you remember where you rode when the engine came down from the upper switch?

A. I think on the foot board.

Q. If not there, where were you?

A. On the seat—the coal box.

Q. Do you know why you forgot that switch?

A. No, sir, I do not.

Q. Did Mr. Kline ever give you any orders or directions as to turning switches?

A. No sir, he never did.

76 Q. Do you know how long that way of doing the work, that is, throwing the switches for the main line, had been done in that way?

A. It was over two weeks.

Q. What had been the system with reference to that switch before that?

A. Throwing it from the train going down.

Q. Who directed or caused that change from the former way to the way it *it* was when Mr. Kline got hurt?

A. I don't know.

Q. You remember you got directions from some source?

A. Some man told me the pusher was to line up the switch.

Q. So when you were on the pusher you knew the first thing to do was to line up the switch?

A. Yes, sir.

Q. What was the distance in your judgment that Mr. Kline's engine stopped from the lower switch?

A. About 75 feet.

Q. What is the length of the cars and engines in the train?

A. Between 100 and 125 feet.

Q. Then it would take two-thirds of the train on the track before it would reach Kline's engine?

A. Just about.

Q. What duty, if any, did the brakeman on the loaded train have that afternoon, have to perform with reference to watching the head of that train?

A. I don't know whether there was any positive order, but it was understood they were to watch their train, where they were going and watch for the switches.

77 Q. Was there anyone else except the brakeman who could see the head of the train coming to the switch—the lower switch?

A. No, sir.

Q. The engineer couldn't see?

A. No, sir, not the head of the train.

Q. On account of the bend in the track?

A. Yes.

Q. Anyone except the brakeman?

A. No, sir.

Q. What would you estimate the mileage of the tracks of the system to be?

A. Over at the mine and all?

Q. Yes.

A. Between three and five miles.

Q. How many switches?

A. I can't say exactly; must be twelve at least.

Q. In spur tracks, side tracks, various kinds of tracks?

A. Yes, spur tracks.

Q. You have not been railroading before?

A. No, sir.

Q. Did you work for any other mining company before?

A. No, sir.

Q. That is the first braking you did?

A. Yes, sir.

Q. You have frequently come up from the pit with loaded trains; of course you did that day; what position, when you came up from the pit pushing the loaded train ahead of you, would you occupy?

78 A. Most generally sat on the coal box.

Q. Looking where?

A. Looking ahead on the train, but when you are on the pusher there is not so much responsibility on the pusher brakeman.

Q. On the front you would look ahead?

A. Yes, sir.

Q. State how clearly you could see the passing track, the space down between there and the main line as you came to the switch?

A. You could see the side track before your first car struck the switch.

Q. Could you see between the tracks?

A. You could see a ways.

Q. About how far does the passing track swing out from the main track; that is, what space is there between the main line of the passing track and the line next to it; is it a uniform witdh generally?

A. The same as any other switch.

Q. About how much does it average when you get out to the widest place?

A. About seven feet.

Q. Could any cars, if the brakeman was looking ahead, leave the track without him seeing them?

A. Not if he was looking ahead.

Q. What is the usual speed of loaded trains to the best of your judgment running up from the pit and especially while running along by this switch?

A. I couldn't say for sure because I don't know anything about the speed of the train; I should judge between eight and ten miles an hour.

Q. Do you know anything about the quickness with which
79 the train could be stopped under these circumstances in an emergency?

A. No, I do not.

Q. Where were you standing when the collision occurred?

A. I was holding the brake shoes on the right side of the engine.

Q. Face to the switch or back to it?

A. My face was right towards the side of the engine.

Q. Facing the engine?

A. Yes, sir.

Q. With your side to the switch?

A. Yes, sir.

Q. Stooped over or standing?

A. A little bit stooped over down like that (indicating).

Q. Do you remember the position that Mr. Murphy occupied when he was helping?

A. I didn't see him.

Q. If he was helping he was on the other side?

A. Yes.

Q. You saw his train?

A. I see his train when he come down.

Q. They came down—how close to your engine—Kline's engine did Murphy's engine stop?

A. I couldn't say for sure; four to six feet.

Q. Pretty close?

A. Yes, sir.

Q. Usual way of stopping there?

A. Yes, sir.

80 Q. Tell us something about the force with which the loaded train struck the engine?

A. Quite a bit, enough to drive it ahead and throw the first car off the track.

Q. Did you while acting as brakeman have occasion from time to time to couple and uncouple cars?

A. I think once in a while we would couple trains and do switching.

Q. Did you go over the other parts of the system during the month you were there—run over to the shafts?

A. No, I don't remember of going over there at any other time.

Q. Any other time?

A. I have been over there since.

Q. Any difference in the system of doing work since as to switching loading cars?

A. Yes, sir, there is a change in the system of work.

Q. By what means were the cars fastened together?

A. Pin and link.

Q. Ordinary pin and link.

A. Yes, sir.

Q. What kind of railroad track was it—how built?

A. Built mostly of standard ties and railroad steel.

Q. About how long would you estimate the track to be on which you were hauling loaded trains at the time of the accident?

A. From the pit to the dump is between half and three

81 quarters of a mile.

Q. Passing track, how long do you say that was?

A. 275 or 300 feet long.

Q. The switches in question were the ordinary stub switches where you turn the switch over and pull the rail in?

A. Yes, sir.

Q. The rail moves with the switch?

A. Yes.

Q. What is the appliance to turn it?

A. Like the opening and shutting of a jack knife.

Q. Then does the track move with it?

A. Yes, sir.

Q. The difference between them is that in the ordinary switch the points move, but in this the rail itself moves?

A. Yes.

Q. And you move it back then to go on the main line?

A. Yes.

Q. It leaves the rails open on the track if the switch is not lined up?

A. Yes, sir.

Q. What system of signals, if any, were used there in the movement of trains and locomotives?

A. As far as I know about signals they were standard signals.
Q. You have seen signals on ordinary commercial roads?
A. Yes.
Q. From whom did you get your directions as to the sig-
82 nals; where did you learn what the signals meant—stop signal, &c.?
A. Learned them from the rest of the men.
Q. Watching—questioning?
A. Yes, sir.
Q. What do you mean by the rest of the men; brakemen and switchmen?
A. Yes, and my engineer explained some to me.
Q. You have been working for the Minnesota Iron Company ever since the morning of the 21st, have you?
A. Yes, sir.
Q. And are working for them now?
A. Yes, sir.

Cross-examination.

Mr. BILLSON:

Q. Mr. Churchill, were you working on the night or day shift the day preceding this accident?
A. I am not positive I don't remember.
Q. Where were you when Mr. Kline first spoke to you about helping him repair this brake?
A. I was on the opposite side of the engine to him.
Q. And what part of the passing track were you on—at which switch were you?
A. Near the lower switch
Q. That is, the switch nearest the mine?
A. Nearest to the pit.
Q. The pit mine?
A. Yes, sir.
83 Q. Didn't he ask you to help him repair the brake when you were up near the upper switch?
A. No, sir, not that I remember of; I am not positive, but I don't remember of helping; I stood looking at him, I didn't help him.
Q. You didn't help him?
A. No, sir.
Q. And he didn't ask you to help him?
A. Not that I remember of.
Q. Did he tell you what he wanted to do at that time?
A. Not what he wanted me to do.
Q. No, sir, what he wanted to do?
A. No, sir, except he said he was going to fix the brake.
Q. Did he tell you how?
A. No, sir, he did not.

Q. Where were you first standing when he first told you he was going to fix the brake?

A. Standing right by the engine.

Q. Was that on the passing track or main track?

A. I am not positive whether above or below the switch; it was near the upper switch.

Q. But whether on the passing track or main track you cannot say?

A. No sir, I cannot.

Q. Do you know from anything you saw or from what he said to you what he did to the engine up there near the upper switch?

A. All I see him do was turn the turn buckle, or whatever they call it.

Q. You saw him do that?

84 A. Yes, I did, because I was standing leaning on the running board looking at him.

Q. Had he indicated to you whether he expected that if he had time that he would take out the pin and adjust the equalizing lever?

A. Didn't say anything to me about it.

Q. Do you remember making a statement—you know Mr. Windom?

A. Yes, sir, I do.

Q. Do you remember making a statement to him very shortly after this accident as to the circumstances under which it occurred, about the 23rd day of April?

A. Yes, sir.

Q. Where was it?

A. At the Spruce office at Eveleth.

Q. Didn't you state there in Mr. Windom's presence; did you not give this account of what occurred at or near the upper switch, substantially: "We had pulled up to the dump and when we got to the upper switch, I got off, threw my switch for passing track; my engineer pulled back and when he came back to switch, he asked me if I would help him fix brake; I said 'Yes;' we went to work and took out pin that holds the two brake beams together and adjusted it to put it back." Didn't you give that account of what happened?

A. I might have; I don't remember.

Q. Did you not further say "Then we pulled down into clear," meaning further down the passing track, "When we got in the clear other engine" meaning Murphy's engine, "pulled down and about four of their cars jumped the track; brake was not working

85 right then and Kline says, 'We will fix the brake'"?

A. Yes, but we didn't get right to work as soon as we got down there.

Q. Do you think you made this statement to him; are you able to say whether you said to him substantially these words?

A. I would not positively swear to it, no, sir.

Q. And you would not positively swear that you didn't—that you didn't use substantially these words in your statement?

A. No, sir, I don't positively remember; he asked me to state to the best of my ability.

Q. Did you not further say to Mr. Windom, "I asked him if we would take coal and water, as it was close to 5 p. m. or a little after Kline said we had plenty; he went on one side and I on the other; I held up brake shoe on side next main line and Kline was trying to adjust shoe; just then Murphy pulled down with his train; Kline asked whether he would help him; Murphy then came and held the shoe on that side; Kline was there with his hand under trying to put that pin in and I was holding two shoes, one hand on one side and one on the other"?

A. Yes, sir.

Q. Didn't he ask you on that occasion "When he asked you to help him fix brake shoe, where were you?" and did you not reply "I was up on dump first time and my switch was throwed then all right for the passing track; we were not very far from that switch—just above it"?

86 A. That was when we came down from the dump.

Q. You said that when he first asked you to help him fix the brake shoe you said it was up near the lump or upper switch; is that right?

A. Yes, he might have asked me.

Q. If he asked you you probably helped him?

A. I would not swear to it.

Q. How long do you think the work was being done on the engine at or near the upper switch?

A. I was probably there between five and ten minutes.

Q. How did you come to move on?

A. Why, Mr. Murphy was coming from the dump and we wanted to get out of his way so he could get back on the side track or passing track.

Q. So you moved on?

A. Yes, sir.

Q. Is it your impression that when Kline was at work on his engine it was on the upper or lower end of the upper switch?

A. I don't positively remember. I don't remember whether it was on the upper or lower side.

Q. Mr. Murphy's train stopped after you saw it coming down from the dump when his cars got off the track?

A. I didn't see him stop before that.

Q. You supposed he kept right on till his cars got off?

A. Yes.

Q. How far do you think it is from the dump where you
87 saw his train starting down to the upper switch?

A. You mean from the end of the track on the dump?

Q. From where you saw him starting when Kline picked up his tools and started on?

A. He was probably three or four hundred feet from us.

Q. And it was then your duty—yours and Kline's—to go down within 75 or 80 feet of the lower switch and stop there and it was Murphy's duty to go down and come up to within four to six feet of you and stop there?

A. Yes, just clear of us.

Q. What was the first you knew of the cars being off?

A. I happened to look up.

Q. Where were you standing?

A. Outside the track—between the two tracks.

Q. On which side of the track did these cars go off?

A. Part of the wheels was off one side and part on the other going all zig-zag; the cars were off close to the switch; there might have been cars off at it or it might have been above it; I didn't see; I didn't pay much attention to it.

Q. You knew he was off from what you saw, not from what anybody told you?

A. I saw the cars were zig-zag on the track and I knew they must be off.

Q. Did anybody call down they were off?

A. Not as I know of.

88 Q. How long would it naturally have taken Murphy as the trains ordinarily run, as you saw him coming down the hill there—how long would it take him to run that three or four hundred feet that you say he was away?

A. I don't know; a minute or so, as near as I could judge to get on the side track.

Q. Isn't it a fact that just the minute Murphy's cars got off from the track there that Kline says, "We will fix the brake"?

A. I would not say positively to that; it might have been then or a little after or a little before.

Q. You had already consumed from five to ten minutes in your delay at the upper switch?

A. Yes, sir.

Q. Would Kline have been likely, the way business was transacted there, trains moving on, to go down to the lower switch and there take out his pin and there re-adjust his brake after having spent five or ten minutes above, if it had not been for the fact that Murphy's cars were off?

A. They had to fix it because it would not hold, it would not work.

Q. Do you know what was the matter with the brake?

A. The brake shoe would not hold.

Q. You don't know what was the trouble?

A. No, sir, I am not an engineer.

Q. Do you know whether he succeeded in making the change he wanted to?

A. He didn't get it fixed before he got hurt.

Q. Do you know whether he had it out or not?

A. He had the pin out, yes, sir.

89 Q. What did you do when you saw that Murphy's cars were off the track?

A. I was standing on the other side of the engine; about that time Kline asked me to help him.

Q. Just about the time you saw the cars go off?

A. I didn't see the cars go off; I didn't say that; I seen there cars off.

Q. So you didn't see them at the time they stopped?

A. No, sir, I did not.

Q. Did you make any remark to Kline about the cars being off?

A. No sir, not that I remember of.

Q. You have spoken about the brakeman in addition to turning switches having the duties of making certain signals at the steam shovels and loading cars, &c., and helping to take the coal and water?

A. Yes, sir.

Q. Did you help about the firing of the engine, &c.?

A. I never did anything of that kind.

Q. You never did?

A. No, sir.

Q. In the movement of these earth trains is there any coupling to be done under ordinary circumstances or do the trains run solid up and down every day?

A. At that time they were running solid.

Q. So the only coupling or uncoupling would be if a car got disabled or in bad condition?

A. Or in taking one car out and putting another car in, if it was disabled or broke or anything.

90 Re-direct examination.

Mr. ANDERSON:

Q. How long would it take you ordinarily to go from the engine when it stopped on the passing track to the switch and turn to the main line and go back to the engine?

A. Between two and three minutes.

Q. How long would it take you to turn the switch?

A. Just walk down and pick it up and throw it over.

Q. In an ordinary walk it would not take over three minutes.

A. No, sir.

Q. You usually came back to the engine?

A. Yes, sir.

A JUROR:

Q. Did you notice the brake was out of order before Mr. Kline started to fix it that day?

A. I noticed coming down from the dump it would not hold.

Mr. ANDERSON:

Q. Was that the time the brake would not work at the upper switch that you stopped there to fix it?

A. Either the last trip or the trip before; it came near throwing me.

Q. Then it was not working better than the trip before?

A. No, sir.

Q. Was it on one of these occasions it came near throwing you?

91 A. No sir, it came so fast I had to keep out of the way to keep from getting hit.

Q. Why was that?

A. The brakes would not hold.

Q. Was it that trip or the trip before?

A. I don't know; either one or the two.

Witness excused.

EDWARD MURPHY, called on behalf of the plaintiff and, being first duly sworn, testified as follows:

Mr. ANDERSON:

Q. You live at Eveleth I believe?

A. Yes, sir.

Q. And were you working for the defendant as one of the locomotive engineers in April last when Kline was hurt?

A. Yes.

Q. How long had you been running an engine for them prior to that day?

A. I worked there from the 19th of November.

Q. Nearly the same time Mr. K-ine did?

A. Shortly after.

Q. Kline was there running an engine when you came?

A. Yes.

Q. How many locomotive engineers were there there in the employ of the defendant at the time Mr. Kline was hurt?

A. Altogether?

Q. Altogether, yes?

A. Nine, I believe, counting the roustabout.

92 Q. You had another engine there made the 5th engine there—had another engineer for that engine there and day and night shift for the four engines?

A. Yes, sir.

Q. And the same number of brakemen?

A. Yes, sir.

Q. What were the duties of the brakeman in the employ of the defendant at that time?

A. They would coal and water, throw switches, spot cars.

Q. What were the duties of the engineers?
A. To run the engines and obey signals from the brakemen.
Q. Were the trains and engines and cars moved on signals?
A. Yes.
Q. The signals were given by the brakemen?
A. Yes, sir.
Q. At what weight would you estimate the engines used, the four engines?
A. There was two I should judge was 15 ton; I should judge one of them probably fourteen and the rest eighteen or twenty.
Q. How many drive wheels did each engine have?
A. Two on each side.
Q. Piston rods, steam cylinders, reverse lever and other appliances such as you are familiar with on engines generally?
A. Yes.
93 Q. Could you give us an estimate of the weight of the cars, each one empty; I don't suppose you ever saw one weighed or weighed one?
A. No, I did not.
Q. Give us an estimate of their weight.
A. Oh, about, probably a ton and a half; I don't know; maybe two tons, I can't say.
Q. These cars had four wheels, two on each side?
A. Yes, sir.
Q. What kind of track was it you ran these trains over?
A. All narrow gauge track.
Q. By that you mean three feet?
A. Yes, sir.
Q. And what sort of iron rails were there?
A. About,—I don't know the weight of them; about 60 pounds I think they called it.
Q. Somewhat similar as you have observed on railroads generally?
A. Yes, sir.
Q. What kind of ties?
A. Same as ordinary railroad ties.
Q. You remember being on the dump that afternoon when Kline was running the pusher engine?
A. Yes, sir.
Q. You had some cars coming off in bringing the 279 empties back?
A. Yes.
Q. Where did they come off; about the switch?
A. About at the switch.
Q. About how long did it take to get them back on again?
A. I should judge probably a little more maybe than ten or fifteen minutes.
94 Q. How did you do that?
A. The dump men came down and put them on.

Q. Pried them on?
A. Yes, with bars.
Q. Where was Kline's engine at that time?
A. Down by the coal pile.
Q. About how far from the lower switch?
A. Oh, I don't know; about eighty feet.
Q. Where did you bring your engine after you got your cars on?
A. Yes, sir.
Q. Pulled your cars into the clear?
A. Yes, sir.
Q. About how close did you stop your engine from Kline's engine?
A. Probably three or four feet.
Q. Did you notice what Kline was doing?
A. I see him on the ground, yes sir.
Q. Did you find out what work he was doing afterwards?
A. Yes, he asked me to help him.
Q. When you came down on the passing track did you give any signal to the loaded train; did you tell him to come out by any signal on your engine?
A. I believe I did when I got into the clear.
Q. You supposed that switch had been turned when you gave that whistle?
A. Yes, sir.
Q. And then you proceeded to help Mr. Kline?
A. I told him I would as soon as I whistled for water.
Q. Then you did?
95 A. Yes, sir.
Q. Where was Churchill when you came down there?
A. I didn't see him at all.
Q. About what speed did the train come up that day or did you see it when it was coming?
A. I didn't see it.
Q. You didn't know it was running on the passing track?
A. No, sir.
Q. What was the force of the blow, slight or heavy?
A. Pretty severe blow.
Q. Appear as if the train was running ordinary speed when it struck?
A. Yes, sir.
Q. Where were you at that time?
A. I was down in front of the driving wheel.
Q. Did you get hurt?
A. Slightly scratched on both wrists a little.
Q. It pushed the engine back?
A. Yes, against my engine and started it off; I was afraid of my engine and got on and stopped it.
Q. You moved your engine down there pursuant to signals given by the brakemen?

A. Yes, sir.
Q. You are a railroad man on ordinary commercial roads?
A. Yes, I have been; at present work on the Duluth and Iron Range.
Q. You worked as fireman for a while?
A. Yes.
96 Q. How long?
A. About seven years.
Q. On the Iron Range all that time?
A. No, sir.
Q. Different roads?
A. Yes.
Q. Acted as hostler round the round house?
A. Yes, sir.
Q. How long?
A. A day at a time.
Q. That required you to move engines around some?
A. Yes, sir.
Q. Have you handled engines when you were acting as fireman?
A. Yes, sir.
Q. You have been switchman and brakeman?
A. Yes, sir.
Q. State whether or not the daily average risk in and around the operation of this track, engines, cars and track, are different or similar to those connected with the operation of cars on commercial roads,—similar in character—alike; are they substantially similar?
A. Yes sir, practically the same; all the difference is you don't have to ride on the top of them
Q. You didn't ride on the top of these cars?
A. No sir, on the engine all the time.
Q. Apt to be rather frisky or apt to jump the track frequently?
A. Quite frequently, yes.
97 Q. Could you as engineer when you brought a loaded train out of the pit there, as the head of your train reached this lower switch, see the head of your train?
A. I don't think I could unless I was over on the other side; I don't think I could see it.
Q. Were your cars and engines so constructed so that you could see over the train and on the passing track before you ran over the lower switch?
A. I don't think I could unless, in a sitting position,—I might if I stand up.
Q. Where was the brakeman on the two engines of the loaded train; where should they be?
A. On the engine.
Q. Where on the engine?
A. On the left hand side.
Q. This is, on the inside of the curve of the track; the track curves there?

A. Yes, sir.

Q. To the left?

A. Yes, sir.

Q. When you say "to the left hand side" would that bring the brakeman on the inside of the curve?

A. Yes, sir.

Q. Was there anything to prevent the brakemen when in the proper place seeing the head of the train when it came to that lower switch; was there anything to prevent the brakemen on the loaded train seeing the head of the train when it came to that lower switch and the passing track?

A. No sir, there was nothing to prevent them,

98 Q. What were the duties of the brakemen with reference to watching the head of the train passing this lower switch?

A. He was supposed to see it would be clear; my brakeman I would always expect to if I couldn't see how things were.

Q. Were the trackmen apt to be on the track at that time?

A. Occasionally, yes sir.

Q. And could the brakemen see instantly if they were watching the head of the train; could they tell how it was at once?

A. Yes, I think he could.

Q. How long would it take after the brakeman had seen the head of the train passing the passing track, how long would it take him to notify the engineer to stop the train, and the engineer to stop the train in an emergency; how long would it take the engineer to stop the train running at the ordinary rate of speed?

A. I don't know; quite a grade there; probably thirty or forty feet; something like that; I don't know.

Q. You had steam brakes on the engine?

A. Yes, sir.

Q. How long would you estimate the length of the train to be?

A. Oh, I don't know how long; probably 120 or 125 feet; something like that.

Q. Each train substantially the same length?

A. Both trains.

Q. Yes.

A. Same length of course, yes.

Q. Same kind of cars?

99 A. Yes, sir.

Q. What speed should you say they came up usually from the pit to the dump along the lower switch?

A. There are some places they run faster than others.

Q. Give us your estimate of the general run?

A. Probably six or eight miles an hour.

Q. What speed should you say the engines could attain if run at their highest rate of speed; what speed were they capable of?

A. I don't know; I am sure.

Q. Could they run a very high rate of speed?

A. Yes, they would make a pretty good rate of speed.

Q. Prior to the 20th day of April,—the day Kline got hurt and for a couple of weeks immediately prior to that, generally on your train you had charge of the pusher or helper engine; were you the one that had the pusher or helper engine previous to that time?

A. Yes, sir.

Q. Who was your brakeman?

A. Name of Sullivan.

Q. How long if you remember, had they been turning switch after the pusher came on the passing track and stopped in the clear?

A. Oh, I don't remember.

Q. About how long?

A. I don't remember about how long it was.

Q. Some little time.

A. Some time, yes, sir.

100 Q. Whose duty was it when the pusher engine came on and stopped to line up the switch for the main line?

A. The brakeman's duty.

Q. His first duty?

A. That is what my brakeman always used to do; I didn't give him instructions; I didn't call his attention to it.

Q. That is, when you ran your engine down and stopped?

A. Yes, sir.

Q. Then he would come back to the engine?

A. Sometimes he did; sometimes stopped there.

Q. I believe you never gave him instructions,—had to do it as a matter of course?

A. I never did; we used to close the switch behind us.

Q. That is, ran the engine down over the switch and stopped and the brakeman would come back?

A. Yes, sir.

Q. And you changed to this new system?

A. Yes, sir.

Q. This is the system that was in vogue there when Kline was hurt,—was being done that day?

A. Yes, sir.

Q. State whether or not, if the brakeman had seen the train leaving the main line and going up on to the passing track and had notified the engineers they could have stopped their train before they reached Kline's engine; did they have the power to stop their train within 70 or 80 feet?

A. Yes, they could.

101 Q. About how many switches would you estimate to be in the track system of the defendant there?

A. You mean just in the pit?

Q. All over the system; the pit, round the machine shop, shafts, lumber yard, where they kept the laggin; all the tracks and round the pit too?

A. Oh, I don't know exactly; I should judge about 18 or 20 maybe; maybe 15; I will put it at that.

Q. About what is the mileage of track in your judgment?
A. Oh, about three or fou miles I guess.
Q. When did you quit work for the Minnesota Iron Company?
A. 25th of April, 24th or 25th.
Q. Two or three days after Kline was hurt?
A. Yes.
Q. You are working for Iron Range I believe now?
A. Yes, sir.

Cross-examination.

Mr. BILLSON:

Q. What is the first you knew that afternoon about Mr. Kline's brake being out of order?
A. I didn't know anything about it until he told me about it as I came down from the dump.
Q. After you had gotten down near the lower switch?
A. Yes, sir.
Q. Had you noticed that he stopped up near the upper
102 switch?
A. Yes.
Q. And was working on his engine?
A. Yes, sir.
Q. Do you know where he stopped?
A. Yes.
Q. Where was it?
A. Just about the switch; there is a little level spot.
Q. Just before he got to the switch?
A. Yes, sir.
Q. On the main track?
A. Yes, sir.
Q. About how far was that from you?
A. When I was on the dump?
Q. From where you were looking at him—yes.
A. I came down and stopped and he gathered his tools up and backed down in.
Q. He didn't move on until you were about down to him?
A. Yes, sir.
Q. How close had you got to him when he began to move on?
A. I had stopped; he was standing outside; I don't know whether he was wiping his tools off or not.
Q. You stopped for him to get out of the way?
A. Yes, just for an instant.
Q. Then he passed through the switch on the passing track and went on down to the lower switch?
A. Yes, sir.
103 Q. How long was it after he started up before you started—immediately?
A. How long after—I don't understand.

Q. After he started up, put his tools in his engine and started down on the passing track. How long was it before you started?

A. I followed him right down to where the cars went off.

Q. In order to have an idea as to how promptly you followed him, about how far should you think he was ahead of you when your cars jumped the track?

A. Well, he was down—it is a pretty bad place down there and we couldn't go down with a train as fast as a light engine.

Q. I simply want your idea as to how far you were from him?

A. He was standing down below, of course.

Q. You think he had arrived at the passing track?

A. Yes, sir.

Q. Then he had got about 150 or 200 feet ahead of you?

A. I don't know how long that passing track is; probably 200 feet I should judge, I don't know.

Q. You mentioned the fact that these cars jumped the track somewhat frequently; was that due to their small size and lightness—light weight?

A. Well, broken axles and the like of that; I couldn't say what the cause was.

Q. Such accidents as you had there, jumping the track isn't that due to the fact that they were a light car?

104 A. They are light cars.

Q. Are they not more likely to jump the track than the heavier car?

A. This was at the switch; I don't know whether to lay it to the switch or the car.

Q. Do I understand it is your belief that a light car will not jump the track any quicker than a heavy one?

A. A light car will jump quicker than a heavy one.

Q. In the event, Mr. Murphy, of a brake becoming wholly or partially disabled is there any means of stopping or controlling the forward movement of the engine?

A. Yes, sir.

Q. What is it?

A. Reversing the engine.

Q. Does that operate quite efficiently upon it?.

A. Yes, sir.

Q. What kind of an engine do you call those such as were in use there on that narrow gauge track?

A. Locomotive; all I know for them; dinkey; as a rule they call it—nickname for them.

Q. Are they not, as a matter of fact habitually called—uniformly called, dinkey engines?

A. No, all locomotives I guess.

Q. I understood you to testify that as you would be coming up the track from the mine pit toward the lower switch that you would be likely—you being on the right hand of the engine, where you

105 couldn't see the switch—would be likely to ask your brakeman if it was all right?

A. Yes, I always made a practice of that if I didn't get over myself to see.

Q. Upon what principle did you do that?

A. To see whether we were in the clear.

Q. Did you do that from your own sense of what would be prudent under the circumstances?

A. I don't understand the question.

Q. Why would you take that precaution?

A. Well, I would not want to run up in there and run into them; it is a bad place up there to start if you stop between the switches.

Q. You mean that you would like to verify yourself of the fact that the switchman had attended to the switches?

A. I knew the switch was wrong if the pusher had not got back.

Q. But that does not bear in this case, because the pusher was back?

A. Yes.

Q. Do you mean you would only take that precaution of having your brakeman look out if you saw the pusher had not got back there?

A. If the pusher was not there I would not start from view of the siding.

Q. You would take that precaution even if the pusher was there?

A. If the train was there, too.

Q. All I want is your meaning—you would think it the part of prudence—you know what prudence means?

A. No, sir; I don't.

106 Q. You would think it the part of reasonable care if you were going up with a loaded train to have your brakeman look out to see whether the switch had been turned even if you saw the pusher there and the other train?

A. I don't know whether he could see.

Q. If he could see you would consider it reasonable care on your part to have him do so?

A. Yes, sir.

Q. Is that the ground upon which you would think that probably the switchman had forgotten to turn the switch?

A. There is other obstacles, men working on the track and one thing and another.

Q. You think you would have him there looking for men, not at the switch?

A. Looking for anything that might arise.

Q. Then it would not be for the switch particularly you would have him looking?

A. No, sir.

Q. Then you would not have him looking any more at that particular point than you would at any other point?

A. On the dump where we would watch for the dump boss, too; he would be shifting the track; we would watch for him, too.

Q. Well, what would you say if you were going to get down under

your engine and unfasten your brake and go through the operation that Mr. Kline was performing there; what would you say as to being the part of reasonable care to attend to that brake there?

107 Mr. ANDERSON: I object to that as not proper cross examination.

Mr. BILLSON: To test the candor of the witness I propose to ask him what he would do if he were putting himself in the position of engineer on the other side of that switch as a test of witness' candor and good faith.

Objection sustained.

Exception noted.

Mr. BILLSON: I would like to modify the form of the question somewhat, although the court may deem it not distinguishable.

Q. You have stated, Mr. Murphy, that if you were approaching the lower switch with a loaded train you would deem it your duty to have your brakeman on the lookout to see the condition of the lower switch as you approached it.

A. I didn't mention the switch——

Mr. ANDERSON: Counsel evidently misunderstood the witness; what the witness said was to see whether they were in the clear and I think counsel said to see if the switch were turned.

Mr. BILLSON:

Q. Counsel correctly states your answer?

A. Yes, sir.

Q. You have stated then Mr. Murphy, on your direct examination that if you were coming up from the mine with a loaded train and were approaching the lower switch where you saw standing the other two engines and the train that you would deem it your duty to have your brakemen, as you could not see from your side

108 of the cab, look out the other side where the pushers and cars—the engines and cars—were standing clear of your track; is that right?

A. I take it for granted when they were there I have the right of track to the dump after I started from the shovel.

Q. (Question repeated.) You have stated then, Mr. Murphy, on your direct examination that if you were coming up from the mine with a loaded train and were approaching the lower switch where you saw standing the other two engines and the train that you would deem it your duty to have your brakeman, as you could not see from your side of the cab, look out on the other side where the pushers and cars—the engines and cars—were standing clear of your track; is that right?

A. Yes, sir.

The COURT: Did he say that on direct examination?

Mr. ANDERSON: It was on cross examination.

Mr. BILLSON: It was on cross examination, if the court please.

Q. Why would you deem it your duty to see for yourself that those engines and cars were standing clear of your track?

A. For my own protection.

Q. For your own protection?

A. To protect my train before it wrecked.

Q. It would be the duty, would it not, of the engineer and brakeman on the passing track to see that their cars and engines were clear of your track?

A. Yes, sir.

109 Q. Mr. Murphy, you have mentioned the speed attained upon these tracks in the ordinary course of business; I will now ask you as an experienced locomotive engineer what is the ordinary speed of freight and passenger trains upon the ordinary commercial railroads?

A. They run on different schedules.

Q. You may state the ordinary range—from the ordinary minimum to the ordinary maximum.

A. Freight trains run about twenty to twenty-five miles per hour.

Q. How about passenger trains?

A. They schedule generally about thirty to thirty-five miles.

Q. And do they run up as high as fifty miles an hour?

A. Yes, sir; exceed that sometimes.

Q. Well, your estimate of about thirty-five miles as the average, as the usual thing for passenger trains, you included the stops, did you?

A. Some of them at that, yes; where stops are few.

Q. You have mentioned the weights of these dinkey engines; what is the weight of the locomotives in common use upon the commercial railroads, upon the freight and passenger trains?

A. They vary in weight.

Q. Between what figures?

A. Oh, forty-five tons to 160 tons, some of them.

Q. And you have stated the weight of these cars as being in your judgment a ton and a half or two tons; what is about the

110 weight of an ordinary freight car on a commercial road?

A. About thirty tons—no, let me see—thirty thousand pounds—fifteen tons.

Q. How high up do they run?

A. Some of them more than that, some less.

Q. You don't know just how high?

A. No, sir.

Q. These trains appear to have had—these earth trains had about twelve cars in each; how many cars are habitually run in freight trains of a commercial road where the grades are favorable?

A. All depends on the grades.

Q. State the figures between which they run, the minimum and maximum.

A. Twenty-five to thirty sometimes—sometimes less.

Q. Mr. Murphy, as you and your associates in this stripping business were carrying it on from day to day, were the circumstances such you would become pretty well acquainted with each other's habits and methods and traits of character, etc.?

A. Yes, sir.

Q. I understand you to have mentioned that there is in this service as it was carried on there an absence of the usual hazard arising from the climbing up and down and running along freight trains?

A. Yes, sir.

Q. Isn't it a fact that there is also quite largely an absence of coupling service inasmuch as the trains run day after day of twelve cars each except as some particular car may be disabled;

111 does not that reduce the coupling service to quite a low minimum?

A. Yes, some.

Q. Isn't it a fact upon the ordinary commercial railroad one quite fruitful source of accidents is in hand-car service?

A. I don't understand the question.

Q. Are there not frequently accidents to hand-car men on the commercial roads?

A. Quite frequently; yes, sir.

Q. Here, of course, there was no hand-car service?

A. No, sir.

Q. There were not present here, were there, those elements of danger that on the commercial roads arise from oversights of the train dispatcher?

A. No, sir.

Witness excused.

At this point proceedings were adjourned to Monday, September 21 at 9:30 a. m., at which hour they were resumed as follows:

GEORGE W. CHURCHILL, recalled for further cross examination, testified as follows:

Mr. BILLSON:

Q. Mr. Churchill, do you remember that on the evening of Mr. Kline's accident you met at the corner in Eveleth, near the city drug store, Mr. Helps?

A. Yes, sir.

Q. And had some conversation with him and Mr. Richard Lash in regard to the accident?

112 A. We talked about the accident; yes, sir.

Q. Did you or did you not state to those gentlemen or either of them on that occasion, in substance, that when the accident occurred you had started to throw the switch, but that Kline called you back to help him and if it had not been for that you would have fixed the switch?

A. No, sir; I didn't; I don't remember saying anything of the kind.
Q. You didn't say that?
A. No, sir.
Q. Or anything of that kind?
A. No, sir.

Witness excused.
Plaintiff rests.

PATRICK J. O'NEILL, called on behalf of the defendant, and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. O'Neill what is your business?
A. Locomotive engineer.
Q. How long have you been engaged in that line of business?
A. About twelve years,
Q. During any of the time upon regular commercial roads?
A. Yes.
Q. Probably how much of the time upon such roads?
113 A. Well, about half that time.
Q. And the balance of the time engaged how?
A. On stripping and dinkey work, small locomotives.
Q. Were you working for the defendant, The Minnesota Iron Company in their work—their stripping work—at the Adams mine, at the place Mr. Kline was hurt at the time he was injured?
A. Yes.
Q. When did you start work there?
A. November 17, 1902.
Q. Were you at the time in question working on the same engine as Mr. Kline?
A. Yes, sir.
Q. At the time of his injury were you working on the night or day shift?
A. Night shift.
Q. You were operating that engine at night and he in the day time?
A. Yes, sir.
Q. Was that a permanent arrangement or did you alternate with him?
A. It was arranged by the company; we changed every two weeks.
Q. You would work at night for two weeks and then he would?
A. Yes, sir; every two weeks.
Q. This accident occurred, I believe, on Monday?
A. Yes, sir.
Q. Who was on the night shift the week before?

A. Mr. Kline.

114 Q. The night shift?

A. Yes, sir.

Q. The week before the accident?

A. Yes, sir; as far as I understand I think it was; I didn't keep any record of it, but Mr. Kline was, the week before that, night shift.

Q. Do you mean your week—you had changed?

A. No, sir; I was night shift the week before.

Q. You mean no change had been made at the beginning of this week when the accident occurred?

A. No, sir.

Q. You were working the same way then that you had been the week before?

A. Yes, sir.

Q. Well, when I first asked you the question, you stated Mr. Kline was on the night shift the week before the accident; was that what you meant?

A. No, sir.

Q. What do you mean?

A. I meant to say, I didn't keep any memorandum or record of it, but as far as I know I was working the night shift the week before his accident.

Q. But when I first asked you you said Mr. Kline was working at night; is that what you meant?

A. No, sir; no, sir; I was working at night; I didn't keep any memorandum; was not exactly sure.

Q. Have you now any recollection of doing any work on the engine the Sunday night or being present with the engine this Sunday night before Mr. Kline was hurt?

A. I was there, but didn't do any work except what was
115 necessary to keep her steam up and get her ready for Monday morning; didn't do any repair work.

Q. Well, who went to work Monday morning on the engine?

A. Mr. Kline.

Q. Is any work done Sunday night as a rule in the way of operating the engine?

A. Well, we take coal and water; get her ready for the day crew.

Q. And keep the fires up?

A. Yes, keep steam up; get them ready for work at seven o'clock.

Q. Did you attend to the engine that Sunday night—his engine?

A. Yes, sir.

Q. Did you, either that Sunday night or that Sunday, or at any time during the preceding week, put any new shoes on the brakes on this engine?

A. No, sir; I was not working that Sunday; I didn't work on Sunday; it was Sunday night.

Q. My question to you is whether on that Sunday night or on

that Sunday or any time during the preceding week you put any new shoes on the brake on that engine?

A. No, sir.

Q. If any shoes had been put on the engine that week, [illegible] O'Neill, whose duty would it have been to put them on?

A. Kline's.

Q. For what reason?

A. Well, the man on the day shift is supposed to keep the engine in repair.

116 Q. What time in the evening of the day of Kline's injury did you come down to operate the engine?

A. Well, I got down about 6:15 p. m.

Q. What did you do when you got there?

A. Well, I put this pin in.

Q. Wait a moment; then you found the engine, where was the engine standing?

A. In the same place where she usually stands; right by the coal dock.

Q. On the passing track?

A. Yes.

Q. Is that just a little bit nearer the lower switch than the water pipe?

A. Yes sir.

Q. Well, what did you do?

A. I put this pin in and adjusted the brake.

Q. Where did you find the pin?

A. It was lying on the frame, the under frame, lower than that, on the ground, on the board at the coal dock as if it was dropped; I just looked in between the drivers and seen the pin and picked it up.

Q. How long had you been operating that particular engine before that time?

A. Sometime in the middle of January she came there; I couldn't tell the day; some time after New Year's.

Q. Was it at that time a new engine?

A. Yes.

Q. Do you remember how many holes there are in the equalizing lever?

A. Three.

117 Q. Do you know in which hole you put the pin back?

A. In the center hole.

Q. Do you know in which hole it had been prior to that time?

A. It was in the center hole; had been taken out of the center hole.

Q. Then I understand you put it back in the same hole from which it had been removed?

A. Yes sir.

Q. Any doubt about that?

A. No, sir.

Q. Then what did you do?

A. I tightened the turn buckle.

Q. Have you been operating that engine ever since that time?

A. Yes, sir.

Q. Has there ever been a time when that engine in your charge—when the threads of the turn buckle were exhausted so you couldn't tighten it up?

A. No, sir.

Q. Have you ever experienced any trouble?

A. Well, the brake is not sufficient to hold the engine, but I never had any trouble in the threads not being enough.

Q. You never had any trouble by reason of the lack of space at the two ends of the turn buckle?

A. No, sir.

Q. Did you operate that engine that night?

A. Yes.

Q. And ever since?

A. Yes, sir.

118 Q. Did you that night or a few days after have any occasion to readjust the brake further?

A. No, sir; I didn't touch it that week; the day man on the other shift might have, but it was satisfactory to me all that week.

Q. Did you that night notice that the brake needed repair of any kind?

A. After I got the pin in she worked just so; worked satisfactory that night.

Q. Who was it took Mr. Kline's place on that engine?

A. P. E. Woods—Mr. Woods.

Q. Were there any means, Mr. O'Neill, of controlling the action of that engine or stopping it besides using this brake?

A. Yes.

Q. What were they?

A. The reverse lever.

Q. Will that stop it as effectually as the brake?

A. Yes, sir.

Q. Had the engineers, Mr. O'Neill, any duty to perform with reference to switches or any of them—any duty to perform?

Mr. ANDERSON: I presume that means up to the time of the injury; it makes no difference what they do now.

A. Duty to perform; they had no duty to perform because that means to throw the switches; the engineer is supposed to see they are turned for his own safety.

Q. Mr. O'Neill, was that turn buckle on that engine ever altered; that is, any repair been made on the turn buckle since that

119 in the way of extending the threads or otherwise?

A. No, sir.

Mr. ANDERSON: What is the purpose of this?

Mr. BILLSON: Just to show it has been operated ever since as it was then.

Cross examination.

Mr. ANDERSON:

Q. You have been locomotive engineer for ten years?
A. No, sir.
Q. Twelve years?
A. Yes, sir.
Q. Twelve years; and what proportion of that time have you been operating locomotive engines for companies like the defendant in such work as they had on in April?
A. Drake and Stratton Company.
Q. What proportion of the years have you been running a locomotive engine?
A. Four years for the Drake and Stratton Stripping Company.
Q. Similar work to that you were doing for the Minnesota Iron Company?
A. Yes, sir.
Q. What roads were you operating locomotives on as engineer on commercial roads?
A. South Shore; Iron Range.
Q. Became quite well acquainted with the mechanism of locomotive engines and the way of running them?
120 A. Pretty fair.
Q. First-class engineer, are you not?
A. Pretty fair.
Q. When you were operating locomotive engines on the South Shore and other roads you had printed time tables and rules and regulations?
A. Well, sometimes.
Q. Did you ever work for a commercial road where they didn't have?
A. No, sir.
Q. I think not; and you have got a sort of knowledge in your head as to the duties of a locomotive engineer based upon what you have learned of railroading and printed rules and regulations?
A. I don't know as I have; I followed them up.
Q. Those are pretty well embedded in your mind, the rules and regulations as to what an engineer should do on a commercial road?
A. Yes.
Q. You had no printed rules and you had no time card or regulations written or printed while working for the Minnesota Iron Company?
A. No, sir.
Q. When you started work you just took this engine?
A. Yes.
Q. And ran the engine?
A. Yes.
Q. And got no orders or directions from anyone except where to go?

A. I got orders from the foreman.

Q. Yes, he said what engines you were to take and what
121 you were going to do?

A. Yes, more than that, too.

Q. You went to work for the Minnesota Iron Company in November?

A. November 17th.

Q. What was the foreman's name?

A. Dick Lash.

Q. He is here now?

A. *Yes, sir.*

Q. He was foreman at the time Kline was hurt?

A. Not that day.

Q. No, but I mean the regular foreman?

A. Yes, sir.

Q. By that you mean he was in charge of the entire work, all the work being done in the pit and all the work on the railroad?

A. Yes, sir.

Q. More in the nature of a yardmaster aside from the actual running of the shovel and digging the dirt?

A. I don't know what you would call it; he was assistant superintendent and foreman there.

Q. He had that general class of work among other things?

A. I call him assistant foreman.

Q. I am not up there; you were so we ask you to tell us that?

A. I understood him to be foreman.

Q. Yes, I know but you know generally the duties of a yardmaster?

A. Yes, sir.

Q. Didn't he have among other things to attend to them;
122 what would be your answer—duties among other things that resemble those of a yardmaster?

A. Yes.

Q. In a large degree controlled the movement of the trains?

A. Yes.

Q. But aside from that they would move on a system of signals?

A. Yes.

Q. And you would sit by your fire and watch the signals?

A. Yes.

Q. Just as on a regular road?

A. Yes, sir.

Q. And they came from whom?

A. The brakeman.

Q. You had a regular brakeman on the engine at all times?

A. Yes.

Q. When you wished to start your train who gave the signal?

A. The brakeman.

Q. And when you spotted a car who said where it should be spotted?

A. The brakeman.

Q. And when you were loading your cars and another one was to be loaded to whom did you look for directions or orders or signals?

A. The brakeman.

Q. And when you were to take your train out of the pit who gave you orders and directions to run to the dump?

123 A. The brakeman.

Q. The brakeman was in charge of the train and you were in charge of your engine?

A. As a rule.

Q. Sometimes the foreman would chip in and run things?

A. There was a time when I didn't move on directions and instructions at all.

Q. Generally when an engineer undertakes to exercise his own judgment he gets jacked up?

A. We had to check the brakemen.

Q. You mean brakemen make blunders?

A. Oh yes.

Q. So a railroad engineer at no time is ever known to refuse to obey the orders of the brakeman—as a rule?

A. No, sir; they are not.

Q. Only in an emergency or something out of the ordinary you would ever presume to disobey the orders of the brakeman?

A. He had to exercise his judgment.

Q. Do you mean to say an engineer is expected to move except on signal?

A. No, sir.

Q. It would be exceedingly dangerous to have two heads running the train?

A. Yes, sir; supposed to obey the signals and all that.

Q. You had no rules or regulations of any kind or description given you by defendant as engineer that had any reference to the switches, had you?

A. I don't understand.

124 Q. You say you had no rule or order given to you by the defendant or its superintendent with reference to the handling of the switches?

A. Yes, I did.

Q. Did you ever have to handle a switch?

A. No, sir.

Q. Did you ever give orders to have a switch turned?

A. Yes.

Q. Name the circumstances?

A. Shea—they gave me a young fellow one night and he said to me, I want you to see that he throws the switches.

Q. Some young kid?

A. I don't know.

Q. Is that the only instance?

A. Twice.

Q. Did you have any orders as engineer, or directions, with reference to the handling and turning of the switches?

A. Not to the handling.

Q. The only thing you had anything said to you about switches was once or twice when a new man was given you?

A. Yes.

Q. And where were those orders——

A. Right on the engine where he stood.

Q. Now, when you have got a load, your train loaded, and you got a signal from the brakeman to run ahead out to the dump—you would get a signal from the brakeman to run out to the dump in the ordinary course of work?

125 A. In the ordinary course, but not all the time; I didn't go all the time on a signal from the brakeman.

Q. Did you run that line and run that engine to suit yourself?

A. Yes, sir; I have got to see the track is clear.

Q. Did you usually give a coming out signal with your whistle?

A. Not all the time.

Q. But usually?

A. Yes, sir.

Q. And could you on the 20th of April, could you as engineer when you were ready to go out, or in the night, could you see the train on the passing track?

A. I was working on the upper end from that passing track to the dump.

Q. Didn't you work on the 20th, on the night of the 20th?

A. Yes, from the passing track to the dump.

Q. What were you doing?

A. Pushing.

Q. Didn't you bring your engine down to the pit?

A. No, sir.

Q. How did you push—how did you get it up from the shovel to the passing track?

A. The other engine took it up.

Q. Where is the highest grade there?

A. Oh, that is right.

Q. Was this the night of the 20th you are speaking of?

A. Oh, yes, we changed that; that is right.

126 Q. At the time Kline was hurt you would go down to the shovel with the pusher engine?

A. Yes, sir.

Q. And ordinarily coming out you would give a whistle?

A. Yes, sir.

Q. And then you would get a response "come ahead," two whistles?

—. ——.

Q. Would you always do that or would you sometimes run out without reference to those signals provided you could see the train was on the passing track?

A. The men on the train generally looked out for that.

Q. Didn't you sometimes run your train out without giving a signal or receiving one when you saw the empties were on the passing track?

A. If I was on the train I would never go out without giving a signal.

Q. Well, I asked you what was generally done?

A. We got signals.

Q. Sometimes you didn't?

A. No, sir.

Q. When the whistles were blown then the brakeman would give the signal to go?

A. Yes, sir.

Q. In running out with a loaded train your duty consisted of what when you were pushing your train up?

A. Keep steam and *weigh* on the engine.

Q. That was about all you had to do; you had to pay some
127 attention to signals, didn't you; an engineer has to keep his eyes open?

A. The man on the train generally looks out for signals.

Q. And the other engineer, you were familiar with his duties?

A. Yes, sir.

Q. What is his duty then; to keep his eyes open?

A. Yes, sir.

Q. Watch out for signals?

A. Yes.

Q. When you got your load up to the dump you, the pusher engine, or helper engine, you would back your engine on the switch in the clear?

A. Yes, sir.

Q. And it frequently occurred that you had to do something on your engine?

A. Very seldom on the night shift.

Q. And when you were working on the day shift in order to perform that duty—you would frequently have occasion to do some little repairs?

A. Yes, sir.

Q. And you usually did that on the passing track?

A. Sometimes I would do it on the dump.

Q. But where was the more frequent place, as a general thing?

A. Outside of Sunday or noon hours I would do it on the dump?

Q. So it was nothing unusual for you to stop up near between the passing switch and the dump to do that work up there?

A. No.

128 Q. You regarded that as perfectly proper, to stop your engine up there and fix it up?

A. Yes.

Q. And you regarded it as perfectly proper to get round and fix your engine on the passing track?

A. I never did it.
Q. There was nothing improper in it?
A. No, sir.
Q. Did you run your engine in there any time when the brakeman went and lined up the switch for the lower—for the main track?
A. Yes, sir.
Q. How long had they been turning that switch in that manner from the pusher before Kline got hurt?
A. About two weeks maybe. Maybe three weeks.
Q. Who was the brakeman that did your work for you on the dump?
A. His name was Shea—Arthur Shea.
Q. Is he here?
A. No, sir; not that I know of.
Q. Did the brakeman have anything else to do while you were waiting there on the passing track as a rule?
A. Yes, to take coal and water.
Q. You didn't do that every trip?
A. No, sir.
Q. If you didn't he had nothing else to do?
A. Yes, wipe his engine off.
Q. How often did he wipe his engine?
A. Once a day.
Q. As a rule did he have anything to do on that engine except go and turn the switch, except to take coal and water and wipe his engine?
129
A. No, sir.
Q. Didn't take him but a minute to do it?
A. Oh, a couple of minutes.
Q. All he had to do was to walk down and turn the switch?
A. Yes.
Q. All he had to do was to turn it off like that (indicating), it lined up to the main line?
A. Yes, sir.
Q. Then it was all level, no switch target standing up this way, no signal?
A. Yes.
Q. And it sometimes occurred that you were busy on your engine while he was doing that?
A. Well, sometimes.
Q. You attended to your business and you expected him to do the same?
A. It was his business to.
Q. It was not your business to turn the switch?
A. It was my business to see he did.
Q. Was that your business to turn that switch?
A. No, sir.
Q. Did you ever turn it?

A. Yes, I did.

Q. Did you, except when you had some new brakeman to break in?

A. I turned that switch myself.

Q. But did you ever have anything to do in your business as engineer with that switch?

130 A. Sometimes I would come in and take water and get down and turn the switch.

Q. Was that part of your duty?

A. No, sir.

Q. You had nothing to do with the switch as engineer, had you; now answer that?

A. No more than to see it was properly set.

Q. Do you mean to say it was part of your duty to see that the brakeman turned the switch?

A. Yes, sir.

Q. Why?

A. To see about it for my own safety.

Q. Did you always watch the brakeman on your engine to see that every switch was turned?

A. Yes, not behind, but ahead of me.

Q. You mean when you backed in off one track to another?

A. As soon as I was clear of my switch I didn't care how they were left.

Q. Whenever you would come into the railroad yard you would examine the switches?

A. Yes, I would always.

Q. You are noted as an extraordinary engineer—careful engineer?

A. No, sir; for my own safety.

Q. You did this because you — man that wanted to be very careful?

A. Yes, certainly.

Q. When you ran down on this passing track on that engine, did you always when you had work to do, did you always look out for that switch?

A. Yes, always.

Q. You always did?

131 A. Yes, sir.

Q. Watch the other man to see if did his work?

A. Yes, for my own safety.

Q. Was it his business to watch you and see if you were fixing your engine in proper shape?

A. Well I don't know as he did.

Q. Now, you were always looking out for yourself very carefully; you knew if that switch was not lined up for the main line it was dangerous?

A. Yes, sir.

Q. And so whenever you came out of the pit with a loaded train you were looking up the track for the switch?

A. Yes, sir.

Q. Then you didn't mean to say a while ago that you merely kept steam up and way on the engine?

A. That was on the pusher.

Q. You exercised a great deal more care on the passing track?

A. I meant that the man on the engine on the train generally looks out for his switches.

Q. If he got a signal that there was something wrong with the switch and you didn't keep your eyes open what would become of the train?

A. Whistle for a signal.

Q. Then you just kept your ears open?

A. And my eyes, too.

Q. Well, anyway, it was your duty to come out of the pit and know whether the switch was turned?

A. Was not supposed to do that.

Q. You have to run over it?

132 A. The men are supposed to give us the signal.

Q. So when you come out you take it for granted the head of your train will come out all right?

A. The engineer couldn't see ahead of the track.

Q. How about the brakeman?

A. He generally looks after it.

Q. In other words it is the brakeman's business to look after the switches?

A. Yes.

Q. And you have two brakemen over here; they can see across the belly of the curve?

A. Yes.

Q. It is their business to watch the curve?

A. Yes.

Q. To see where they are going?

A. Yes.

Q. Your cars sometimes jump the track?

A. Yes.

Q. Then if the brakeman was not watching that—if he was not watching the head of the train he was not performing his duty?

A. Well Kline's brakeman.

Q. I didn't ask you about Kline's brakeman; I am asking you—if a brakeman on the loaded train were not watching the head of the train when they came out, they were not performing their duty?

A. They were supposed to watch the switch.

Q. I am asking if they didn't watch the head of the train when they ran up to that lower switch——

A. I had my brakeman always under orders to watch out for signals.

133 Q. The brakeman could see the head of the train at all times?

A. Yes.

Q. It would be impossible for the train to leave the track if the brakeman was watching it without him seeing it?

A. It could go for two or three cars before the brakeman could see it.

Q. You just said the brakeman could see the head of the train?

A. They couldn't see the wheels.

Q. They could see the car?

A. Yes, but the car and the wheels is a different thing.

Q. Well, if the wheels went off?

A. If he is watching the body of the car he couldn't see.

Q. When you look out there on the left-hand side where the brakeman is you can see the inside of the track?

A. Yes, sir.

Q. You can see the switch connections with the passing track?

A. Yes, sir.

Q. If the wheels of that head truck left the main track and went over on the passing track the brakeman could see it?

A. If he could see the wheels.

Q. Would not the body of the car shift?

A. I have looked out time and again; you couldn't see it.

134 Q. When the first car left the main track and passed on the passing track would it not shut the view off?

A. No, sir; the passing track and main line is so narrow for fifty feet.

Q. When the passing track leaves the main track it leaves at the ordinary angle of a switch, then it takes the curve in with the curve of the main line.

A. Yes.

Q. So you have to shoot out at the usual ordinary angle of a passing track?

A. No, sir; because you take it on a track like that——

Q. You mean to say that a car to leave that main track with the main track laying up this way with the curve that way (indicating), do you mean to say one of these cars could leave the main track and not be seen if you were watching?

A. Yes, I think maybe three of them can leave without you watch the wheels——

Q. I want you to understand my question; put one of these cars over the switch where it leaves the main track here, taking one of these cars stationary, let it stand there, one-half on the passing track and one-half on the main track; place yourself below there and look over the switch there up the main line and see if you can see the rails then beyond?

A. No.

Q. Well, why don't you say so then; why, because the car is between your line of vision and the rail just beyond?

135 A. Yes, sir.

Q. Can you see the open space between the main track and the passing track with one of these cars standing on the switch?

A. Not by looking at the body of the car, you want to examine the wheels——

Q. I am asking you if you can see the open space between the tracks?

A. Oh, you couldn't do that.

Re-direct examination.

By Mr. BILLSON:

Q. But whenever you give a signal; what do you call that; a coming out signal when you get loaded ready to come out of the pit? What is the name of the signal; how many whistles do you blow when you say you are ready to go out?

A. Two whistles.

Q. And the engine on the passing track gives you two whistles to come out?

A. Not in the day time.

Q. How do you do in the day time?

A. We look out for them.

Q. It is your business to look out for them?

A. Yes, in the day time.

Q. But at any rate when the signal, coming out signal is given, and the come ahead is given in response then the engineer on the engine would take it for granted everything was all right to pass up the main line?

A. Some might; I never did; I always seen the switch was lined up.

136 Q. Did you get off your train to see the loaded train?

A. No, sir; I told my brakeman to look out for that every time we came out of there.

Q. You would push a train out if you were on the pusher engine?

A. Yes, sir.

Q. Signal given to come ahead?

A. Night time, yes.

Q. Then you didn't pay any attention to the switch?

A. We understand that is all clear.

Q. When the signal is given to come ahead, you engineers all take it the switch is lined up?

A. Yes, sir.

Q. There couldn't be any question about that?

A. No, sir.

Witness excused.

J. B. PETERSON, called on behalf of the defendant and being first duly sworn, testified as follows:

By Mr. BILLSON:

Q. What is your business?
A. Timekeeper.
Q. For whom?
A. For the Adams mine.
Q. In the employ of the Minnesota Iron Company?
A. Yes, sir.
Q. How long have you been timekeeper there?
A. Since the 7th of December, 1901.
137 Q. Did you keep a daily record of the men actually employed in the service of the company there?
A. What way do you mean?
Q. Did you make a daily note of the men who are employed?
A. The daily time was there; his time kept in the books and a report made of it every day, the number of men.
Q. Did you have occasion to note—was it your duty as timekeeper to note the days during which Mark Kline was at work for the company during the month of April last?
A. My duty to take his time and keep track of his time.
Q. Well, Mr. Peterson, what are your duties as timekeeper?
A. To go over and get the time and enter it in the book; that *it*, I am on the surface, just surface time.
Q. Did you of Mr. Kline?
A. Yes, sir.
Q. What he was doing last April?
A. Yes, sir.
Q. What was he doing?
A. Running an engine.
Q. Have you any record to show whether he was working for the Minnesota Iron Company on the 20th of April last?
A. Yes, sir.
Q. And the week preceding that?
A. Yes, sir.
Q. Any record to show whether he was working day or
138 night?
A. Yes, sir.
Q. When was the record made?
A. Made in April; that is, made in the time book; all we have to go by.
Q. When was the record made?
A. In April; that is, I don't know; there has no record been made of that.
Q. Have you your time book in your hand?
A. Yes.
Q. Who made those marks in that book?
A. I did.

Q. All of them?

A. No, sir; the day shift was marked by myself and the night shift by the foreman.

Q. Turn to the page on which are recorded the times for April—the time of the different men for April; I see marks; one series of marks on the upper half and the lower half?

A. Yes, sir.

Q. Which half represents the day service?

A. Why both; one line means—that means nights and a cross means days.

Q. Which of those marks did you make?

A. The day shift; the cross there.

Q. The cross shift—Mr. Peterson, was it your duty on the 20th of April last to find out what men were working on that day on the stripping plant at the Adams mine, where Mr. Kline was hurt?

A. Yes, sir.

Q. Was it your duty to make marks in the book that day showing what men were at work?

139 A. Yes, sir.

Q. How did you find out the men were at work?

A. Went out and saw them.

Q. And was it your duty to do the same each day for the week preceding the 20th of April last?

A. Yes, sir.

Q. Did you make the daily report of the men that were at work on that plant at that time?

A. Yes, sir.

Q. But I understand you to say it was not your duty to keep a record of the men at work on the night shift during that period?

A. No, sir.

Q. That was kept by the foreman?

A. Yes.

Q. But the record of both were kept in the same book?

A. Yes.

Q. Have you in your hands the record to which you have referred?

A. Yes, sir.

Q. Please let me look at it for a moment; do the two pages of the book at the point at which you have opened it have reference to the record of which you have spoken for the month of April, 1893?

A. Yes, sir.

Q. And the entire page relates to that month?

A. Yes, sir.

Q. What is indicated by this series of numbers running across the top of the page, commencing with 1 and ending with 31?

A. That is the days.

140 Q. The days of the month?

A. Yes, sir.

Q. The marks made in the columns under these dates consist in some cases of an X and in some cases of a straight line?
A. The X is the day shift and the line means night shift.
Q. So the marks which you made in this record are all cross marks?
A. Yes, sir.
Q. Those made by the foreman relating to the night shift were the straight marks?
A. Yes, sir.

(Pages marked Defendant's Exhibit I).

Q. Upon these pages to which you have referred I find certain cross marks under the number 13, referring, as you say, to the 13th of the month, and from that on up to and including the 20th; were the marks under each day made by you on the day to which they relate?
A. Yes, sir.
Q. Do you know them of your own personal knowledge to be correct?
A. Yes, sir.

Mr. BILLSON: The two pages of the record referred to and identified by the witness are offered in evidence for the purpose simply of showing that Mr. Kline was working on the day shift for the week preceding the injury.

Mr. ANDERSON: It is admitted he worked on the day shift
141 for the week preceding the day he was injured; I will admit the book shows that he worked on the day shift the week preceding.

Mr. BILLSON: If the court please, if the admission is that he was in fact working on the day shift.
Mr. ANDERSON: I simply say we admit the book shows it.
Mr. BILLSON: Then we prefer to offer the book in evidence.
Received without objection.
Witness excused.

T. E. WOODS, called on behalf of the defendant, and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. Woods, what is your business?
A. Locomotive engineer; dinkey locomotive.
Q. Have you at any time worked upon a regular locomotive?
A. Yes.
Q. For how long?
A. Four years; standard lines.
Q. How long upon the dinky?
A. One year.

Q. Are you now employed by the Minnesota Iron Company in running this dinky engine No. 1, by which Mr. Kline was injured last April?

A. Yes, sir.

Q. You succeeded him as engineer on the night shift on that engine?

A. No, sir.

142 Q. On the day shift?

A. Yes, sir. I went on the day shift the following day.

Q. The morning after his injury?

A. Yes, sir.

Q. You operated the engine that day and have you operated it either night or day ever since?

A. Yes, sir.

Q. Did you observe that the brake was out of order on the Tuesday when you went to work or any time during that day?

Mr. ANDERSON: Objected to as incompetent; Tuesday, next day after the accident; it has been shown that O'Neill was on the engine and did some adjusting the night before.

Objection overruled.

A. No, sir; I didn't.

Mr. BILLSON:

Q. Do you remember having had occasion to repair it any time during that week?

A. Not as I recollect of.

Q. Have you had occasion a number of times since to regulate by turning the turn buckle?

A. Yes, sir.

Q. Has there ever been a time since you have been at work on the engine when the threads on the turn buckle were used up so as it could not be further tightened?

A. No, sir.

143 Cross examination.

Mr. ANDERSON:

Q. If the brake was adjusted too tight then the turn buckle would be run up on the thread further?

A. Yes.

Q. And if you wanted to adjust the brake more loosely then you would turn it the other way?

A. Yes, sir.

Q. So where the witness testified the brake was too tight on account of new shoes he would not turn the turn buckle up, but back, wouldn't he?

A. Yes.

Re-direct examination.

Mr. BILLSON:

Q. Have you at any time since you have used that turn buckle noticed there was any difficulty in turning it in any direction you wanted to?

A. No, sir.

Q. Or any indication of there not being enough thread for that purpose?

A. Never.

Q. Mr. Woods, as I understand it, this turn buckle is a sort of link with an opening in each end through which certain sections of the brake run, so that by turning the turn buckle those two sections of the brake can be drawn nearer to each other, thereby tightening it up or drawn further apart, thereby loosening it?

A. Yes, that is correct.

144 Q. When the brake needed to be tightened up you would turn it so as to draw those two sections of the brake nearer together?

A. Yes, sir.

Q. From anything you have ever noticed about the operation of the brake on the engine and those ends getting close together, was there any danger either present or prospective of their touching each other as observed by you?

A. No, sir.

Mr. ANDERSON:

Q. What do you understand that last question to mean, Mr. Woods?

A. I understood in tightening the brake whether if they were sufficiently tight there was any space between the two ends of the turn buckle.

Q. You didn't mean it to ask whether anybody had ever tightened them up so as to draw the threads together?

A. If there were shoes on there that were worn out; I have not had it tightened up——

Q. Do you know whether anybody did do it?

A. I don't know; no, sir.

Q. You don't know whether when Mr. Kline was under that engine at the time he got hurt that the turn buckle was up to the end of the thread?

A. No, sir.

Q. You could do it?

A. Not with the brake shoes on.

Q. Did you ever try it?

A. Yes, I have pulled it up.

145 Q. You never saw this engine till the 20th of April?

A. Yes, I have seen it.

Q. You had never worked it?

A. No, sir.
Q. You succeeded Mr. Kline?
A. Yes.
Q. You ran a standard engine four years?
A. Yes, sir.
Q. What do you mean by a standard engine?
A. On a standard gauge.
Q. Do you know what the word "dinky" means?
A. These small, narrow gauge engines commonly called dinky engines.
Q. Do you know whether there is such a word; ever look in the dictionary?
A. No, sir.
Q. Did you ever see it printed?
A. In the papers.
Q. It is a common word for you men to apply to these engines used on these roads up there; you call them dinky engines?
A. Yes.
Q. What is printed on the engines, anything?
A. No, that is, on ours.
Q. You have seen signs on there, "No one allowed to ride on this locomotive except the brakeman and engineer"?
A. Yes, sir.
Q. They call them locomotives?
A. Yes.
146 Q. They are upon the same principle except that you do your own firing and they are considered on the same principle as a standard engine except that they are narrow gauge?
A. Yes, sir.

Witness excused.

A. K. TEISBERG, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. Teisberg, have you been connected at any time with the board of railroad and warehouse commission in the State of Minnesota?
A. Yes, sir.
Q. What was the nature of your connection with them?
A. I became connected with the State warehouse commission in 1885 as assistant secretary.
Q. How long did you serve in that capacity?
A. Until 1890 and from 1890 to 1901 I was secretary of the commission.
Q. So you were connected with the board from 1885 to 1901?
A. Yes.

Q. During that period, Mr. Teisberg, was it the duty of the board to acquaint itself with any railroad constructed in the State of Minnesota?

A. Yes, sir; that was one of their duties.

Q. Do you know about when—do you know whether in 1887 at any time in 1887 there were in the State of Minnesota any
147 railroads other than the ordinary commercial roads—commercial railroads, acting as common carriers?

Mr. ANDERSON: I object to that; I don't see quite what it means; I object to the question as incompetent and immaterial.

The COURT: It is for the purpose of putting fully before the court the question of law that will arise. Objection overruled.

A. No, I am not aware there were any railroads operating; that was my belief and information; if there had been we would have found them because it was part of our duties to find and ascertain what roads there were located that did the business of a common carrier that were amenable to the railroad laws.

Q. What, as far as you know, Mr. Teisberg, was the first road—railroad—in the State of Minnesota for merely private use; without engaging in the business of a common carrier?

A. I think it is called the Itasca Lumber Company's railroad running from near Deer river to the pine woods; at least, that is my recollection.

Q. Yes, and about when was that constructed?

A. I should say about 1890 or 1891.

Cross-examination.

Mr. ANDERSON:

Q. There were street car lines constructed in the year 1887 in the State of Minnesota that you know of?

A. Yes.

148 Q. And also at that time do you know of any electrical street railroads in the State of Minnesota?

A. Not in 1887.

Q. But you know of one cable line in St. Paul?

A. Yes, sir.

Q. But there were also no so-called logging roads until 1891?

A. 1890 or 1891.

Q. Since then there have been quite a number constructed, Powers and Simpson's for one?

A. Yes, quite a number.

Q. You had nothing to do with the logging roads?

A. No, sir, since they were doing private business.

Q. Your jurisdiction is only over quasi public corporations?

A. Yes, sir, common carriers for hire.

Witness excused.

E. H. WINDOM, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. Windom, have you any connection with the Minnesota Iron Company?
A. Claim agent.
Q. And were you connected with it in April last?
A. Yes, sir.
Q. Do you remember on or about the 23rd of April last taking a statement from George C. Churchill as to the circumstances
149 under which Mr. Mark Kline had suffered an injury a few days before?
A. Yes, sir.
Q. Did you have that statement taken down?
A. By a stenographer, yes, sir.
Q. Who was the stenographer?
A. Edward B. Ryan, Jr.
Q. After his minutes were transcribed were his minutes handed to Mr. Churchill to read?
A. Yes, sir. I read it and I handed it to Mr. Churchill and he read it himself.
Q. Did he look it over?
A. Yes, sir.
Q. Did he at that time sign it?
A. Yes, sir, before Mr. Ryan, a notary.
Q. And do you know whether Mr. Ryan swore him to its contents?
A. Yes, sir, before Mr. Ryan; he always does; he did that time.
Q. You read it over at the time, did you?
A. Yes, sir, I gave the questions and answers.
Q. Do you know it was a correct statement of Mr. Churchill's answers at the time it was taken?
A. A correct statement of his answers, yes, sir.

Mr. BILLSON: I will offer the entire statement of Mr. Churchill in evidence for the purpose of showing a variance with his statements made on the stand.
Received without objection (see page 200 of this record.)

150 Cross examination.

Mr. ANDERSON:

Q. You are claim agent for the Minnesota Iron Company?
A. Yes.
Q. Also for the Missabe road and another road here?
A. Yes, and the Chandler Iron Mining Company.

Witness excused.

C. E. MORE, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. What is your profession?
A. Physician.
Q. Where engaged in practice?
A. Eveleth, Minnesota.
Q. In general practice there?
A. General practice and mine practice—general practice.
Q. Did you attend and assist in the operation, or conduct the operation upon Mr. Kline at the time of his injury about the 20th of April last?
A. Yes, sir.
Q. Some reference has been made, Doctor, to the fact that there was a delay of some little time between his injury and the operation about what time was the operation performed?
A. He was taken between 9 and 10 o'clock and operated upon between 10 and 11.

151 Q. What was the reason or reasons for the delay?
A. One principal reason would be the shock; take a man with such injury to the arm produces a shock and it is not advisable to amputate during the shock if it can be avoided and another reason was another patient was operated on before there and we had to wait for that.
Q. Doctor, to what extent, if any, did you personally see Mr. Kline after the day of the accident?
A. Well, I dressed the arm once after the accident I think; I think it was after he left the hospital.
Q. Did you gather from what Mr. Kline said or otherwise that he was injured otherwise than in the arm [illegible]d, if so, to what extent?
A. He complained of a little pain in [illegible] back; I know of nothing else. When we put him back to bed we looked him over.
Q. Did you hear anything about an injury to his ankle?
A. Nothing at all.
Q. Did you see upon his body any evidences of injury?
A. I have no recollection of any evidence except he complained of pain.
Q. What I mean is, was there any surface sign of his being injured?
A. I have no recollection of any at all.
Q. Do you remember of your attention having been called to any injury to the knee?
A. No.

Cross-examination.

152 Mr. ANDERSON:

Q. I believe you said you dressed his arm once after the amputation?

A. Once in the office after he left the hospital.

Q. Some other person took care of him?

A. My assistant, Dr. Bowers.

Q. He had the care of Kline after the operation?

A. Yes, sir.

Q. So you don't pretend to know anything about Kline's physical condition?

A. I didn't dress the arm; I would see him occasionally.

Q. How, passing through the hospital?

A. I would stop and ask him how he was doing.

Q. Any treatment or administering of medicine, that would be by some other physician and the nurses?

A. I didn't prescribe for him after.

Q. Did any one else?

A. I presume so.

Witness excused.

J. H. HEARDING, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. Hearding, what is your business or profession?

A. Mining.

153 Q. Are you an employé of the Minnesota Iron Company at the Adams mine?

A. Yes, sir.

Q. In what capacity?

A. Superintendent.

Q. How long have you been in its employ?

A. Nine years, the last of next November.

Q. Some reference has been made in the testimony, Mr. Hearding, as to the extent of the trackage about the Adams mine proper, the trackage owned by the Minnesota Iron Company; do you know about the length of this track running from the pit where the stripping was going on, up to the dump?

A. Yes, sir.

Q. About what is its length?

A. Two miles, the entire system.

Q. You don't answer my question?

A. About three quarters of a mile approximately.

Q. How much trackage down there is there owned by the Minnesota Iron Company or operated by it in addition to the track from the pit to the dump?

A. Two miles.
Q. Do you know the length of it?
A. Yes, sir.
Q. How do you know?
A. I measured it.
Q. Did you measure all of the side tracks and spurs?
A. Yes, sir.
154 Q. Is that track, Mr. Hearding, all situated on land which is covered by leases held or operated by the Minnesota Iron Company—mining leases?
A. Yes.
Q. Is it all upon one Government section or upon more?
A. All upon one Government section.
Q. Is this track from the pit to the dump—I will say referring to this track from the pit to the dump, is it used—you may state for what purpose it is used?
A. It is used in transferring the stripping material from the pit to the dump.
Q. Is that the only use made of it?
A. And—yes, sir.
Q. Have you ever occasion to run the steam shovel over that portion of the track?
A. Yes, occasionally.
Q. And that steam shovel is the shovel with the aid of which you do this stripping?
A. Yes, sir.
Q. Reference has been made in the testimony to the ties used in the construction of that track; is there any reason why ties of the regulation size are used—of regulation length?
A. They are used in that portion of the track where the steam shovel moves; otherwise the ties are 6 feet 6 inches in length.
Q. When was this stripping track built; that is the central portions of it, not shifted from time to time?
A. The present track was built approximately about April
155 there; the system has been working there in a different position since about the 15th of November.
Q. That is, this stripping portion?
A. Yes, sir.
Q. For what purposes were the other tracks used—or are the other tracks used—aside from this stripping track?
A. Those tracks at the mine proper are used for the transferring of timber to the different shafts from the timber yard, coal for the coal dock, to the boiler houses, the hauling of various tools from the shafts to the blacksmith shop or any other supplies from the warehouse to the shafts.
Q. Are those tracks, used for the purpose you now mention, connected in any way with the stripping track?
A. Yes, sir.
Q. At one point or more?

A. Yes, at one point.

Q. When was that connecting link built between the stripping track and what you may call the timber tracks?

A. About December or January last.

Q. For what purpose, if any, is that connecting track used?

A. For the transfer of coal and supplies to the steam shovel and the dinkies and also to carry the engines to the mine machine shop for repair in case they need it, carry any pieces of machinery that require repair.

Q. Is this stripping operation a part of the mining work
156 of the Minnesota Iron Company?

A. It is connected with it; it is not a part of the underground work.

Q. What relation has it to the mining business of the company?

A. Simply removing the surface from a portion of the ore so it can be taken out later and through No. 4 shaft; of course it is connected to that extent—in that respect—with the mining operations.

Q. The object of removing the earth is to facilitate the moving of the ore; is that right?

A. Yes, sir.

Q. Referring to the evidence that this track from the pit to the dump is composed of sixty pound rails?

A. Yes.

Q. What kind of rails do the other tracks consist of used for coal and timber?

A. They are twenty, thirty and forty-five and one or two lengths are sixty pound rail in the other system.

Q. And how many switches are there that are used in connection with all this trackage to which you have referred?

A. Including the stripping track?

Q. Yes.

A. Approximately fifteen including the stripping.

Q. Do you know about what is the weight of these cars they use on the stripping plant?

A. Approximately two tons; maybe a little more or a little less.

157 Q. About what is their length?

A. Twelve feet over draw heads; that is, car in length out of draw heads is exactly twelve feet long.

Q. I don't understand whether you include the draw heads in that?

A. Yes, including the draw heads.

Q. Has any of these tracks ever been used for any other purpose than carrying on the mine and stripping business there for the Minnesota Iron Company?

A. No, sir.

Q. Referring to the cars, what is their capacity in cubic yards?

A. They hold three cubic yards of broken dirt.

Q. The weight of which is about what?

A. Approximately a ton and a half.

Q. To what extent is there a braking or coupling service necessary with the operation of these trains?

A. Trains are coupled into units of twelve—were at the time of this accident and were never uncoupled except in case of an accident to a car where it needed to be set out for repair otherwise there are no brakes on the cars.

Q. There are no brakes on the cars?

A. No, sir.

Q. So that the brake, the operation of the steam brake on the engine is eliminated entirely?

A. Yes.

Q. Is the same true of the cars that were operated with coal and timber over on the other track?

158 A. Yes. I would like to make one statement; I think there were two cars that occasionally carried coal that have a brake on them; those are the only two I know of in the service.

Q. On any of these cars, the braking service being dispensed with, it is not necessary for the brakeman to climb them or run along the tops?

A. No, sir.

Q. To what extent is the handling of cars on these other timber and coal tracks in the form of single cars and to what extent are trains made up?

A. The largest number of cars I have ever seen handled with timber are three and that very seldom; in the majority of cases cars were handled by the engine, one or two at a time, rarely three.

Q. Reference has been made to machine shops; what shops are they?

A. The mine shops.

Q. Is there a necessity for considerable work of that kind in connection with the mining operations, apart from the stripping?

A. Oh, yes, sir.

Q. What class of work is necessary?

A. Why, boring out pumps, surfacing valves, boring out steam cylinders of enginss, also facing the car wheels for underground work, mine skip axles; all such repair ordinarily incidental to the operation of an underground mine.

Q. You have underground tracks?

A. Yes, sir.

Q. What kind of cars do you run upon those?

A. Two kinds; one timber body—wooden body, another steel car.

159 Q. How are they propelled?

A. The steel cars by electric locomotives; the other cars either hauled by mules or propelled by men, depending on the distance they have to go.

At this point proceedings were adjourned to 2 o'clock p. m., at which time they were resumed as follows:

Q. Mr. Hearding, there has been some reference to the use of the word "dinky" in connection with these engines; is that merely a nick name given to these engines by the men in the yard, or is that a name given them in the trade and in catalogues?

A. Yes.

Q. Which?

A. It is the name given them in the trade at times.

Q. It is not a mere local name?

A. No, sir.

Q. Have you in your possession a photograph of these engines?

A. Yes, sir.

Q. Taken when?

A. About a week ago or two weeks ago.

Q. Seems to be a broad side view of the engine; does it give an accurate picture of the engine in your judgment?

A. Yes, sir.

Q. The same engine Mr. Kline was running?

A. Is it No. 1; I didn't notice it in the photograph; yes, sir.

Photograph marked Defendant's Exhibit 2 and offered in evidence.

160 Received without objection.

Q. Mr. Hearding, I think I will call your attention to a question which was raised this morning in connection with Mr. O'Neill's testimony; have you ever had occasion to observe the ease or difficulty with which a person can promptly detect, when at the rear of one of these trains, whether the front end as it arrives at the lower switch, entering upon it—upon the passing track or upon the main track?

A. Yes, sir, I think so.

Q. What is the fact about that?

A. It is extremely difficult to tell for the reason the cars approaching the switch are not in a straight line with either the engineer or fireman; the head end is on the curve, consequently the broad side is presented to the fireman, or what would be the fireman in an ordinary engine; owing to the broad side being presented to him it is impossible to tell how far that car turns until it has made a very marked deflection from the usual course.

Q. If the track there were straight the situation there would be entirely different?

A. Yes, sir.

Q. I will ask you whether the diagram which I hand you was prepared under your direction from surveys which you caused to be made?

A. Yes, sir.

Q. You are entirely familiar with the track and grounds yourself?

A. Yes, sir.

161 Q. Is that an accurate diagram of the track over which Mr. Kline was running?

A. Yes, sir.

Q. And showing also the passing track upon which the engine was standing?

A. Yes, sir.

Q. And showing the two switches which have been referred to during the testimony?

A. Yes, sir.

Mr. BILLSON: I will offer the diagram in evidence.

Q. When was this diagram—this survey made—upon which this diagram is based?

A. That survey was made on the first day of April; that diagram was made from notes of a survey dated the first day of April.

Q. Now, Mr. Hearding, I observe on the diagram, departing from the passing track a short distance above the lower switch, I observe a small track called the repair track?

A. Yes.

Q. Was that track there in April last?

A. Yes, sir.

Q. That switch was in running order?

A. Yes, sir.

Q. And diverging from the upper side of the track, I notice a track marked "mine track?"

A. Yes, sir.

Q. That represents the track which joins this stripping track to the timber and coal tracks you have spoken of?

A. Yes, that is between the pit and the first switch on the passing track.

162 Q. What is indicated by this lower portion of the diagram?

A. The average grade of the track.

Q. What is that average grade?

A. Approximately on the average two and seventy-five one hundredths; average grade is two and eighty-four one hundredths feet per hundred feet; that is a little higher than I said.

Q. In your judgment, how much variation in different parts of the track are there from that grade?

A. It might increase or decrease half of one per cent.

Q. So the grade on this passing track would be about what?

A. Approximately two per cent.

Q. Two per cent?

A. Yes, sir.

Cross-examination.

Mr. ANDERSON:

Q. I believe you have said that the portion of the defendant's track on Defendant's Exhibit 3, the diagram, I am not sure, but I think you said it was about a quarter of a mile long?

A. It is about that.

Q. That does not include the track around in the pit?

A. Yes.

Q. Takes it all in?

A. Yes, sir.

Q. About a quarter of a mile in the pit?

163 A. Yes, sir.

Q. And half a mile outside?

A. Yes, sir.

Q. The portion of the track on this Exhibit 3 called the repair track was a place where you often took cars for repair?

A. Yes, sir.

Q. Do you remember whether it was full of cars there that day?

A. I don't know; I was not a witness of the accident.

Q. You were there at the time?

A. No, sir, I was not.

Q. Are you a railroad man?

A. No, sir.

Q. Have not been asked the question as to whether the trains and running gear were controlled in substance by other brakes than that on the engine; I believe you said that was the only brake you had?

A. Yes, sir.

Q. That was operated by steam?

A. Yes, sir.

Q. There were only two cars that had brakes that you hauled coal and other material with?

A. Yes, sir.

Q. And the grade was about two and eighty-five one hundredths feet to each hundred feet?

A. The average grade.

Q. Some steeper than that; you had some level track?

A. No, sir, none longer than thirty or forty feet.

164 Q. When you set cars out how were they held?

A. Blocked.

Q. If they had to be uncoupled or should break you had no way of controlling the run away part of the train?

A. No, sir.

Q. On an ordinary train they use air?

A. Yes.

Q. They call it a dynamite brake so that there is not so much liklihood of the cars running away as on this system you had here?

A. Oh, I——

Q. How may employés did you have there; how many men working in and around this Adams mine and railroad—shovel, trackmen, engineers, brakeman—combines, how many men?

A. You include merely the stripping crew?

Q. Yes, stripping crew and all other men working about this track?

A. The stripping crew is about 100 to 105 men both shifts combined.

Q. That is, engineers, brakemen and everything?

A. Timber men, track men, pit laborers.

Q. You had a track gang?

A. Yes, we had a gang to keep it in repair.

Q. You had five engines?

A. Four employed on the stripping and one at the mine; one used entirely up at the mine.

Q. Hauling supply cars around?

A. Yes, sir.

Q. You had a good deal of business to do in that line in
165 connection with the operation of the mines?

A. Yes, a good deal.

Q. A good many cars of supplies you had to move from time to time?

A. Yes, sir. Principally in coal and timber.

Q. That includes the laggin too?

A. Yes, sir.

Q. You keep an engine busy at that class of work?

A. Most of the time.

Q. You hauled three cars at a load?

A. Oh, yes.

Q. Why limit it to three cars?

A. There is no occasion.

Q. You had other cars in case you needed them?

A. Seldom more than three cars to spare; that is, the sort we loaded at different shafts.

Q. I mean if they were all unloaded?

A. Yes, we had six cars.

Q. I believe you said the entire system of track was two miles in length?

A. Yes, sir.

Q. Was it two miles exclusive or inclusive of the stripping?

A. Exclusive.

Q. Two or three quarters miles altogether?

A. Including both systems.

Q. They were one system as far as being connected with switches; you could run an engine over the whole system?

A. We could.

166 Q. You did take these cars that were engaged in stripping over other parts of the system?

A. Not the stripping cars.

Q. Did you sometimes take the engines over?
A. We took them up there for repairs when——
Q. And in this machine shop that you have spoken of, in addition to the various repairs and kind of work you have referred to, you repair the cars and also the engines when repairs were necessary?
A. Which cars?
Q. The cars you used in stripping?
A. No, sir.
Q. Where did you repair those?
A. On the repair track.
Q. You have had cars pretty badly broken up?
A. Yes—not so badly.
Q. The cars are very apt to be off the track?
A. At times, yes, at others, no, sometimes; depends on the conditions, weather——
Q. Now, in reference to Exhibit 2, or the engine of which that is a picture, there is nothing on the engine in the way of print or engraving or marks, indicating the name of the engine is "dinky" engine?
A. No, sir, no.
Q. And when you order an engine—the defendant company should order an engine—you don't order by saying "dinky" engine?
A. I have, sir.
Q. That is not a customary way?
A. Yes, sir, it is.
167 Q. Do you find it that way in the catalogue?
A. You will find in Porter's catalogue a statement of a light locomotive or dinky engine.
Q. As far as you have learned it refers to a light class of engine?
A. Yes, sir, light class of locomotive.
Q. You don't know whether or not there is any such word recognized in the English language in the dictionary?
A. Hardly, unless it is a provincialism; the only place I have ever seen it was very recently; it was in the case of the formation of a society of dinky locomotive engineers; that is the only place I have ever seen it used as a word.
Q. But as far as you have been able to see or observe this Exhibit 2, with the exception that there is no individual fireman, is operated the same way as any commercial railroad locomotive?
A. Yes, sir.
Q. And it weighs in the neighborhood of 40,000 pounds?
A. From 24,000 to 36,000 pounds.
Q. This engine in your answer admittedly weighs twenty tons?
A. That is correct; it varies as to the weight of the tank.
Q. You were asked approximately the weight of three cubic yards of earth—that it would be a ton and a half?
A. Yes, sir.

Q. Does it not weigh closer to one ton?

A. No, sir.

168 Q. Did you ever see one weighed?

A. Yes, I made the statement; that was three cubic yards of broken dirt.

Q. That is a great deal less in weight than solid earth?

A. Yes.

Q. You didn't take a solid cubic yard—never weighed them?

A. No, sir, I never weighed them.

Q. A loaded car would weigh in the neighborhood of four tons?

A. Three and a half; from that—between that and four tons maybe.

Q. To what extent, Mr. Hearding, have you experimented as to the facility with which you could see the head of the train just before and at the time it struck the lower switch of the passing track, you being at the engine?

A. I probably have observed it from the left hand side of the engine approximately twenty-five times.

Q. Did you observe it when it ran in from the main track on to the passing track?

A. Yes, sir.

Q. What was the occasion?

A. I don't know except that the switches were wrong.

Q. Was it thrown to see whether you could see it passing the passing track or not?

A. Yes.

Q. You mean to say, standing on the foot board of the engine, looking through the window where the brakeman is placed—

169 where he is supposed to be, you couldn't tell when the rear of your train shut off your line of vision?

A. No, sir, I couldn't tell.

Q. You could see down between the passing and main track when the head of the train reached the switch?

A. No, sir.

Q. Why not?

A. Because the passing track was too nearly at right angles.

Q. Now, how far is it from the so called lower switch and the switch running in—that leads from the track—running into the mine track?

A. About 200 or 250 feet.

Q. When the head of your train reached this lower switch your engine attached to the train would be over the switch to the passing track?

A. Yes.

Q. And standing on the foot board you could see the passing track and all that would be on it?

A. You couldn't see both tracks.

Q. Couldn't you see from this side right here (indicating)?

A. No, sir, because the ground here intervenes, right here (indicating) you can see the switch but not the passing track.

Q. What did these engineers mean by seeing in the day time; when they stood out there they can see whether the empties are in on the passing track?

A. Yes, sir.

170 Q. Can see where the pusher is standing?

A. Yes.

Q. When the head of the train reaches this lower switch, how far up the passing track could the brakeman see?

A. How far up this track could he see the rails or the cars?

Q. How far up the passing track could he see the engine standing—100 feet?

A. Approximately 75 feet he could see the track itself.

Q. Then he could see the switch?

A. Not on the left hand side; on the right hand side.

Q. He could see the place where the switch passed?

A. Yes, sir.

Q. And could see the track up 75 feet itself above the switch?

A. Yes, sir, he could see the rails, not to distinguish the passing track.

Q. Did you ever run a train?

A. At intervals.

Q. Ever a brakeman?

A. No, sir.

Q. You know what a brakeman has to do?

A. Yes, sir.

Q. Presumably have his eyes open?

A. Yes, sir, expected to.

Q. He has nothing to do except watch when they were passing the train by the switch?

A. As far as I know.

171 Re-direct examination.

Mr. BILLSON:

Q. Mr. Hearding, I think I have asked you before, I ask you now, are these dinky engines in use on this plant and similar plants on the other stripping work in the mining regions of St. Louis county, inspected regularly under the State boiler inspection law?

Objection made as immaterial.

The COURT: If the question were asked concerning anything that went before the jury, I would sustain the objection without any hesitation, but as it is before the court——

Mr. ANDERSON: I withdraw the objection; it is not for the jury anyway.

A. Yes, sir.

Mr. BILLSON:

Q. And are your engineers required to have certificates required by the State boiler inspection law—to have certificates from them to entitle them to operate these engines?

Objected to as incompetent, irrelevant and immaterial and encumbering the record.

A. Yes, sir.

Q. You have stated, Mr. Hearding, that these engines are called sometimes dinkies and sometimes locomotives, as I understand you?

A. Yes, sir.

Q. Is there any other name that is applied to them in the ordinary course of business that you know of?

172 A. They are known as light narrow gauge.

Q. Anything else, any other name; I was thinking you mentioned in conversation another name?

A. The scientific name you might say is sometimes steam motors in comparing them with electric motors or air motors.

Q. How in capacity do these dump cars compare with the dump cars used in railroad construction or other earth work, which are operated by horses?

A. They are about from a third to a half larger.

Q. What is it that is likely to control in determining whether a horse dump car should be used or a car operated by engine?

Objected to as incompetent and immaterial. Objection overruled.

A. The volume of business determines the method employed.

Q. Do you observe among practical men any line at which it is deemed more economical to operate with a number of cars in a train and drawn by an engine?

A. Yes, sir.

Q. What is that line?

Objected to as incompetent, irrelevant and immaterial. Objection overruled.

A. From 100 to 150 use a wheel scraper; from 150 to about 600 feet you would use a hand car pushed by men, the grade being with the load; from about 500 feet to 1,200 feet it is generally found best, even at higher grades, when the grades are not too severe, to

173 use small dump cars filled by hand and drawn by teams; about that point and where the grade exceeds half of one per cent. to one per cent. in a hundred they usually employ an engine, cars and steam shovels, depending upon the volume of the work.

Re-cross examination.

Mr. ANDERSON:

Q. It is practically the same principle where people want to get to a certain point and it is too far to walk and they get a steam railroad?

A. No, sir.

Q. If you wanted to get a big lot of work out of this mine that you were excavating and it was not convenient to haul by horses and wagons, you put on locomotives and cars and laid down the railroad track; it is more convenient and economical?

A. Possibly, not more economical.

Q. More convenient?

A. Yes, sir.

Q. Do your work more quickly?

A. Yes, sir.

Q. Then if you do enough volume of business it is by far the most economical?

A. Volume of business determines it.

Q. And you have an immense volume of business in the Adams mine?

A. Pretty fair size.

Q. It is going to take a year's work?

A. Yes.

Q. Before you mine the ore?

A. We are mining now.

174 Q. But you keep excavating out larger?

A. Yes, unloading the pit.

Q. It is on the same principle exactly as if you were getting out lumber in the woods, you can get your trees out by loading them on a wagon or on a railroad?

A. Yes.

Q. But the lumber companies don't do that up there with teams?

A. Yes, sir, I believe they do.

Q. The same principle you do your work on?

A. No, sir, not exactly.

Q. You employ engines the same as the lumber companies?

A. They have wide gauge; we have narrow.

Q. And couple their cars into a train and load it up and haul it out to their mills or wherever they want to haul them?

A. Yes.

Q. And you loaded up your trains and hauled them where you wanted to?

A. Yes, sir.

Q. And you dumped your dirt and they take their logs to their mills?

A. Yes, sir.

Q. And they operate their engines the same as you do?

A. No, sir.

Q. By steam?
A. Yes, sir.
Q. You don't have tenders on your engines?
A. No, sir.
175 Q. But you have coal to run your engines with?
A. Yes.
Q. It is lodged there on a tender and they couple them up, have automatic couplers as a rule on logging roads?
A. Well, I am not familiar with logging roads.
Q. And they have sometimes a mile or two of logging track; sometimes forty or fifty?
A. All depends in operating on the distance the material is hauled.
Q. And when you come to the operation of your road—of your railroad system, it is operated along the lines of a logging road?
A. No, sir, the supervision is entirely different.
Q. Some logging trains don't even have conductors?
A. Well, all I know of.
Q. There are some that have a short road where they don't; do you know of that?
A. No, sir, I never did.
Q. But in your case you don't have work enough; isn't the principle of operating your road similar; you have tracks, side tracks, switches, cars coupled together with link and pin, moved by engines operated by steam—substantially the same as a logging road?
A. Yes, sir, but they have other things as well.
Q. And when you speak about the line of demarkation between wheel barrows and push cars, you were referring to whether it may be more economical or convenient?
A. Yes.
176 Q. If you were using wheelbarrows at the Adams mine it would take you a very long while?
A. Depends on where the delivery was.
Q. And if you had to use horses and wagons it would be a very expensive operation?
A. No, sir.
Q. It would be very slow?
A. It would depend on the number of teams and number of cars employed.
Q. There is a limit, is there not?
A. I have done just as much work——
Q. Take and put a steam shovel in there with the number of men you have got, you can keep two trains of twelve cars each busy?
A. Yes, as a rule.
Q. And it is more convenient to use railroad tracks and engines to move supplies about?
A. Some.
Q. You would not use it unless it was advisable and advantageous?

A. No, sir.
Q. You have something to do with determining that question?
A. I established that plant.
Q. As to whether it is a railroad or not you have not given it any special consideration?
A. Never considered it a railroad.
Q. You used the material and appliances you deemed best for that kind of work, including locomotives for the class of work?
A. Yes sir.

Witness excused.

177 H. L. DRESSER, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. What is your profession?
A. Chief engineer, Duluth, Missabe and Northern.
Q. Were you at one time connected in an engineering capacity with the Duluth and Winnipeg railroad?
A. Yes.
Q. What year?
A. From June, 1890, to June, 1892, latter part of May.
Q. Was the Duluth and Winnipeg a railroad in course of construction?
A. Yes, sir.
Q. From Duluth northwest across the State?
A. Yes, sir.
Q. And over what part of the line of that road did you have occasion to pass to become familiar with it?
A. From Duluth to the end of the track at that time, Deer river; I was up about that far when I was on construction, just east of Winnibegoshish to Ball Club lake.
Q. Were you at one time down near Duluth in the vicinity of Brainerd on the Northern Pacific?
A. No, sir, I was not.
178 Q. During those years did you have anything to do with the location of a logging road in northern Minnesota?
A. Yes.
Q. What road was it?
A. It was called the Itasca Logging road, I think.
Q. As far as you know, Mr. Dresser, was the first logging road, or the first railroad of any kind devoted to purely private business, which was constructed in Minnesota?
A. Well, there was another one building at the same time; I don't remember which got to work first; the Nelson company were building one up about Stony brook.
Q. How long?

A. Thirteen miles, I think.
Q. What time?
A. In 1891.
Q. As far as you know were those the first that might be termed private roads, not open to public use?
A. I think those were the two first except it may have been further south, but I think those were the first that were built in Minnesota.
Q. I understood you to say you located that Itasca lumber road as originally constructed?
A. Yes, sir.

179 Cross-examination.

Mr. ANDERSON:

Q. Were you familiar with the railroads of Illinois in 1879, down round Galesburg, Illinois, Monmouth county?
A. Why, I don't know that I was, anything more than in a general way.
Q. You know nothing about any narrow gauge roads that were being operated in the vicinity of Galesburg; you don't know what class of engines were used on narrow gauge roads in 1879?
A. Not in Illinois; I know what there was in Iowa.
Q. That was a light engine?
A. Yes.
Q. Not weigh over twenty tons?
A. Yes, light compared with——
Q. Very light in comparison with the ordinary standard engine?
A. Yes, sir.
Q. Would that weigh twenty tons?
A. Yes, I should say they would.
Q. They all had tenders had they not, carried coal on a tender?
A. I don't know that I ever saw but one without a tender.
Q. Where did you see that?
A. Used to run out of Des Moines on a stub road.
Q. Did you ever see the motors they used from St. Paul to South St. Paul?

180 A. Yes.

Q. Were those motors not constructed substantially on the same plan as Exhibit 2, with the exception of the tenders?
A. They were heavier than that; they were a small engine; I said the engine at Des Moines didn't have a tender to it; it did have a tank over the top of the boiler and a little box behind held coal.
Q. When was that engine in use in Iowa?
A. From about 1878 to about 1881 or 1882; they had it I guess in Des Moines pretty well up to '90, but it was not used, only round the yard.

Witness excused.

W. A. McGONAGLE, called on behalf of the defendant, and being first duly sworn, testified as follows:

Mr. BILLSON:

Q. You reside in Duluth?

A. Yes.

Q. Have for how many years?

A. About twenty-one years; between twenty and twenty-one years.

Q. What is your business?

A. I am vice president of the Duluth, Missabe and Northern Railroad Company.

Q. Prior to that time what was your business?

A. Assistant chief engineer, Duluth and Iron Range for a little over a year previous to that resident engineer for the same company for about 18 years.

Q. You have been thus engaged in railroad business in
181 northern Minnesota during the twenty-one years which you have stated?

A. Yes, sir.

Q. As far as you know, Mr. McConagle, what was the first railroad built in Minnesota for purely private business, not for common carrying, but for carrying logs or earth or anything of that kind in a purely private enterprise?

A. I think the Itasca Lumber Company built the first railroad in 1890 or 1891.

Q. Where was that?

A. Northern part of the State.

Q. The one referred to by Mr. Dresser?

A. Yes, the same one.

Q. About what time were the first railroads built in Minnesota for the purpose of stripping mines or earth work of that sort?

A. Along about 1892 or 1894 when the Missabe range was opened up.

Q. In 1887 Mr. McGonagle, in the case of an ordinary commercial railroad—1887, when, as I gather from your testimony, there was nothing in the State in the way of railroads except commercial roads, or common carriers, was there any employment on such a road for any of its employés prior to its being opened for public use, except the work of construction; I don't know whether I have made myself clear?

A. There was not.

Q. Now, Mr. McGonagle, I desire to ask you a few questions with regard to the characteristics of the ordinary railroad and in
182 some respects the characteristics of this plant in controversy; are you personally acquainted with the stripping plant at the Adams mine where Mr. Hearding is in charge and where Mr. Kline was injured last spring?

A. I am.

Q. You are acquainted with the agencies employed there and the methods of business?

A. Yes, sir.

Q. Upon the standard of commercial roads what are the ranges of speed in the operation of trains?

A. About 15 miles an hour to 70 to 80 miles per hour on the fast express trains.

Q. What would you say is the average speed of a passenger train?

A. About thirty miles per hour.

Q. And what do you think is the average speed of a freight train?

A. About 15 miles per hour.

Q. Can you give anything illustrative, give an idea to the jury as to the momentum of the ordinary freight or passenger train?

A. Explain by comparing the weight of the trains?

Q. Yes, might give us some idea of the weight of the trains?

A. I think an ordinary freight train will weigh from 500 tons to 3,500 tons, depending on the grade of the track and the rate of speed; a train of the character that is used in stripping the Adams mine would probably weigh 50 or 60 tons at the extreme the
183 relative momentum may be readily obtained by assuming a rate of speed, comparing these two weights.

Q. The momentum may be made up by a combination of weight and speed?

A. Yes, sir, weight and speed.

Q. Do you know whether on this stripping plant or any of the tracks used by the Adams mine in transferring their wood and coal, there is anything in the way of embankments or trestles that might be a source of danger?

A. I don't know of anything that might be considered dangerous.

Q. How is that generally with regard to commercial roads?

A. There are in all commercial roads long, high bridges depending on the topography of the country, of course, usually also heavy embankments depending on the same conditions, which add somewhat to the hazard of operating the railroad.

Q. Greatly increase the hazard in case they occur, do they not?

A. You bet they do, yes.

Q. Can you say anything in reference to the relative dangers from collision in your judgment upon the stripping plant in question and upon the ordinary commercial road?

A. In ordinary commercial roads the trainmen must trust to a large degree to the infallibility of train despatchers and to other employés in the telegraph department; in this case of the Adams mine stripping proposition there are no telegraph despatchers
184 at all and ordinarily the complete operation of the railway is complete from all points; the hazard in this respect then is materially less in the case of the Adams stripping tracks over that of the ordinary commercial road.

Q. How is it upon commercial railways with reference to the probability, or the facility rather, which the employés have of be-

coming acquainted with the habits and characteristics of the persons by whom their safety may be jeopardized?

A. In the case of a commercial road there are of course a very large number of employés and it is difficult for the men to become acquainted with their characteristics except those that are in daily connection with each other; in the case of the stripping tracks in the Adams mine the number of operatives in the train service is so limited that it should be a very easy matter for each of them to know all engaged in the operation of the trains and be perfectly familiar with the same.

Q. And the conduct and manner of service of their co-employés?

A. Yes, sir.

Q. What, if any, do you know is the extent of the braking service—service of braking upon these stripping trains?

A. There is less danger of accident to brakemen on trains of this character from the fact that there is only one man employed in addition to the engineer.

Q. Do you know whether there is any brake on these cars at all?

185 A. There is nothing on the car and none is necessary.

Q. It is operated——

A. The whole movement of the train is operated by the engine; the cars are always coupled and attached to the engine; in the ordinary commercial railroad cars are switched, coupled and uncoupled frequently, which is not the case in this stripping plant at the Adams mine.

Q. Do you know any occasion for the coupling of cars except as casually from time to time some car may become disabled?

A. No occasion except in case of an accident.

Q. Can you give any idea of the prominence of railroad brakemen's duties in braking and coupling as a source of peril in the operation of railroads?

A. The railroad commission reports of the State of Minnesota indicate——

Objected to as incompetent, immaterial and hearsay.

Q. Well, Mr. McGonagle, probably you may have it of your own knowledge and observation of that as a railroad man?

A. I would state from my own experience, over twenty years in the railroad service, that a large percentage of accidents are due to coupling and uncoupling cars.

Q. And climbing and moving over the cars?

A. That adds to it, the falling off of cars, traveling back and forth from the front to the rear of the train, and brakemen are required to pass over box cars, flat cars, ore cars in stormy weather and

186 consequently the peril is exceedingly great and many accidents have occurred from this source alone; this is unheard of in the case of cars used in stripping the Adams mine.

Q. Have you any idea, Mr. McGonagle, as to the percentage of

railroad accidents which are traceable to this coupling and uncoupling of cars on commercial roads?

A. I cannot give the figures, but I think fully one-half of the accidents to brakemen are caused by coupling and uncoupling cars and falling off cars passing over them.

Q. And have you any idea at all as to the percentage of accidents to railroad employés which falls upon the brakemen?

A. Most of the accidents on a railroad train occur to the brakemen and not to the conductor or engineer and fireman.

Q. Are there upon the standard or commercial roads any considerable number of accidents connected with the hand-car service?

A. Yes, a great many; the section man has no knowledge of any trains on the road except the regular carded trains and he is required at times in the performance of his service to pass through rock cuts, round curves and over bridges at great peril to his life; it is one of the ordinary hazards of railroading.

Q. That is on account of being overtaken by trains?

A. Yes.

Q. From the nature of the case is it feasible for him to be
187 notified or warned of extra trains?

A. It is not feasible; he is generally always beyond the reach of telegraph service.

Q. You have already given an idea of the relative weight of trains; I will ask you to state somewhat in detail between what figures does the tonnage of the standard locomotive run?

A. About sixty tons to one hundred and thirty tons.

Q. And the freight cars?

A. Freight car usually weighs from twelve to fifteen tons.

Q. And the passenger coaches and Pullman cars?

A. About thirty to thirty-five tons.

Q. And how many cars generally make up the train in freights?

A. Depends largely on the grade of the road.

Q. Between what figures?

A. Between 25 and 75, approximate figures.

Q. Are there any special dangers arising on many of the commercial roads from the intricacy of the switching system in large yards or things of that sort?

A. Yes, complicated system of switches, controlled in some cases by hand and in other cases by operators in switch towers; the safety of the switches is largely determined by the perfection of the workmanship of connecting levers in the case of machine thrown switches and in the case of a large number of hand-thrown switches
188 it depends on the reliability of the employés and their clearheadedness in knowing what switch to throw.

Q. What have you to say as to the element of danger in standard roads arising from the effect of storms and washouts or matters of that sort at points remote from observation?

A. I can state from my own experience that there have been frequent accidents due to washouts that do not show from any indica-

tion on the track; the engine will pass over the particular point and without warning the engine is thrown in the washout by the soft gravel silting under the weight of the engine.

Q. Do you know whether there is anything in the location or construction of this road that would be liable to dangers of that kind?

A. Nothing; it is on firm ground.

Q. If there are any other points of difference between the two classes of roads, I wish you would state it?

A. I would state that a stripping railroad such as the Adams track is in my opinion a tool for moving material.

Q. Is there anything in respect—that occurs to you in which this operation of—I ask the question of you as a practical railroad engineer—as to what differences there are, if any, between this operation of excavating earth from this pit and dumping round about on the dump or the ordinary operation of cuts and fills of railroad construction; is it substantially the same thing?

A. No, it is not.

189 Q. In what respect does it differ?

A. The operation is totally different in the construction of a railway from the stripping of a mine; the engineering problem is different.

Q. Of course there are differences in their aims and purpose and all that, but what I mean is the operation itself of moving the earth from a cut and depositing it on a fill—isn't that substantially what is done in the construction of commercial roads?

A. It is if the same appliances are used.

Cross examination.

Mr. ANDERSON:

Q. That is, Mr. McGonagle, if you were engaged as a contractor by a railroad company in filling in an old pit or ground which they intended to have tracks upon or run over in their yards, you could use either in that work the standard size cars or you could use the narrow gauge track with small cars?

A. Yes.

Q. And it would be simply a question as to whether you wanted to haul heavy loads or lighter loads as to which kind of car you would use?

A. It is.

Q. And if you were engaged as a contractor in making a fill in low ground where after you put in the fill you intended to lay a railroad track, in doing that kind of work ordinarily you would build temporary tracks?

A. Yes, if the magnitude of the work is sufficient.

Q. Well, if there is very much of that work to be done,

190 you do that?

A. No, the ordinary method is to use what we call peddler cars, with horses.

Q. That is, small?

A. Well, cuts of considerable size.

Q. You can't think of any distinction in the method of doing work if you are using cars at all between when to use a standard car and standard engine and another using small engines and small cars?

A. No, the one that would use large cars and standard track would use bad judgment.

Q. In railroad construction work they usually use the small cars?

A. Yes.

Q. And the small engines?

A. Yes.

Q. And in your judgment it shows bad judgment on the part of the contractor to use standard engines and standard cars?

A. Yes if he uses engines at all.

Q. And if you were hauling gravel to fill in, ordinarily you would think it better judgment?

A. Well, not in gravel, because it does not yield as earth does.

Q. What difference does that make?

A. It makes great difference in the engine staying on the track.

Q. But I mean in constructing the track?

A. We use horses and small cars.

Q. When you use steam at all?

A. If you use engines at all, yes.

191 Q. In doing that class of work you do it in the same way whether you use large engines or small—large or small cars?

A. Yes.

Q. Leaving out the question of degree, leaving out the question of momentum, the same class of dangers accompany the doing of the work with small cars as with large?

A. No, sir; I don't think so.

Q. Why not?

A. You introduce dangers with your large shipments that you do not with small.

Q. What difference is there in the class of danger running a train of large cars than running a train of twelve cars that would weigh from one to two tons each?

A. The difference in the number of wrecks you would have.

Q. What difference is that in the class—the kind of danger—that there is in running a heavy train in construction?

A. Theoretically there would not be.

Q. Is there any more danger of a wreck when using the heavy cars loaded with dirt than when using the light cars in loads of dirt if the track is constructed in a sensible manner in the first instance?

A. If the tracks were ballasted with reference to the weight I would say no more danger.

Q. Can a contractor make it reasonably safe for that kind of work?

A. He never does; he ought to, but does not.

192 Q. Do the dangers to which you have testified have relation to the fact that these men didn't do their work right?

A. I testified simply to the facts as I know them.

Q. There is a vast difference in the weights of railroad trains as compared to twenty-six years ago?

A. There is yes.

Q. Vast difference in the weights of the engines and their speed compared with then?

A. Yes.

Q. Are you familiar with the operation of all the logging roads in this section of the country on the ranges here?

A. Yes, quite familiar.

Q. But there is a very material difference in the last sixteen years in the weights of trains, speed, etc.?

A. There is.

Q. In the operation of a logging road—calling your attention to logging roads, they are, as far as you know, all private roads?

A. Not all of them, quite a number.

Q. And they vary in length very materially, do they not?

A. Yes.

Q. Depends on how far they haul the logs?

A. Yes.

Q. And you know some instances where they load the logs in winter and run them out to the mills?

A. I don't know of any that run direct to the saw mills; I

193 know some run direct to the lake and dump the logs in the lake for rafting.

Q. As far as you know operating their lines over their own lines or lines leased by the logging company?

A. I can't say I do know any such.

Q. You don't know of any reason in the necessity of things requiring logging roads to be a mile long or a hundred miles long?

A. No, sir.

Q. They could have one a hundred just as well as a mile?

A. Sure.

Q. Taking a logging road where the company get their own logs, say they were operating two trains of 12 cars each, as the stripping company did, back and forth on one track and having a passing track; when they come out there there is another train of 12 cars on the passing track ready to come in, is there any difference in principle in the operation of such a system and the railroad of the defendants in the Adams mine?

A. Nothing particular in principle.

Q. Any difference in the class of dangers?

A. Yes, a great deal.

Q. What is the difference in the kind or class?

A. Difference in the weight of the cars.
Q. Assuming the cars are substantially the same weight?
A. I mean the——
Q. Assuming they had such light loads as two and a half tons of logs, is there any difference in the kind of danger?
194 A. In theory, no; in practice, yes.
Q. Have you not got the difference in your mind in the degree of danger?
A. I think the class of danger is different in the logging; I mean the liability of accident from various causes.
Q. Don't you mean practically in degree?
A. Yes.
Q. No train despatcher is necessary then?
A. It depends on the length of the track.
Q. Track a mile long?
A. They don't need any.
Q. As far as you can tell, if cars are the same weight and the loads are the same weight, then the logging train and the dirt train are the same as regards liability of danger?
A. The theory of operation is the same.
Q. You mean there is not so much danger in operating one of the stripping trains than one of your great trains?
A. Yes.
Q. And you base that largely on the momentum attained by a train of five hundred tons?
A. Yes.
Q. But in either case if you run over a man, you hurt him, cut his leg off?
A. Yes.
Q. You would not dispute the proposition that if one of the cars broke loose going up the grade it would be extremely dangerous?
A. No doubt about it if the car was behind the engine.
195 If the car was on the descent side of the grade.
Q. So the only time you can imagine it breaking loose is in going up hill?
A. Yes.
Q. In one of your commercial trains with air—freight trains—there is not quite so much danger of the train running away?
A. No.
Q. Then it is much easier to control the action of the broken part of the train than on one of the defendant's trains?
A. No doubt of it.
Q. Ordinarily in these days you don't operate brakes by hand?
A. Not on all roads; nearly all of our western roads are equipped with air brakes.
Q. And that does away very largely with the necessity of running over your trains to brake in order to check the speed of the train?
A. It does away with that part of it; it does not eliminate running over the train.

Q. A great many of these you have enumerated arises from the slippery condition of the cars?

A. To the weather conditions besides.

Q. Generally in your judgment these accidents you have referred to are generally due to something the railroad company has no control over in a very large majority of cases?

A. Yes, I should say so.

Q. Where you spoke of the 50 per cent. of accidents that
196 were due to coupling and uncoupling and falling of cars, I didn't take you to mean by that that these accidents are due to the negligence of the railroad company or of the employés, other than the men who get hurt themselves?

A. That is what I mean.

Q. So the dangers which result to those men are practically because the men are not careful?

A. Not entirely; in the part referring to the coupling it is usually the man's own fault.

Q. Very rarely otherwise?

A. Very seldom.

Q. So it is usually the man's fault if he is injured in coupling or uncoupling cars?

A. Yes.

Q. Then it does not arise out of the danger itself, but out of the man's own carelessness?

A. It is true.

Q. And a man falling off cars that is usually due to his own carelessness and you have an idea it is such because you don't have to get on the top of cars to slip off?

A. The men are not there to fall off.

Q. That is the reason the danger does not exist?

A. Frequently they don't have to cross over the train.

Q. If they do it would be dangerous either because of the weather conditions or their own carelessness?

A. It would be dangerous in that class of equipment.

Q. But there is the same danger, taking another system of substantially the same size, a commercial road, two and a half
197 miles of track with fifteen switches, doing the same amount of work the defendant does, isn't there substantially the same amount of danger in the one case of the defendant's road as the other?

A. I think there is more on the commercial road.

Q. Over the same length of track?

A. Yes.

Q. Operating the same number of trains?

A. Yes.

Q. There is more danger on the commercial road?

A. Yes.

Q. Than at the Adams mine?

A. Yes.

Q. Why?

A. Because there are more men engaged.

Q. Why should there be more men engaged in the operation of two passenger trains than in the work trains?

A. I would like to state here—you are putting up some theoretical cases.

Q. It does not matter to you?

A. It does because I don't base my knowledge on theoretical railroads.

Q. You have stated it would take a larger number of men to operate a commercial train than to operate in the mines—why?

A. There is a larger number of employés.

Q. Why would there be a larger number of employés on a commercial road of two trains?

A. I would like to refer you to the statutes of Minnesota;
198 a commercial road is required by law to put a conductor and two brakemen on the train; a stripping proposition like this isn't required to do anything.

Q. You have assumed you are familiar with the Adams Mine road; they had two engines, two engineers, two brakemen, making four.

A. They have five on an ordinary train.

Q. Are there any more trackmen in one case than the other?

A. Not any more on two miles of road.

Q. Didn't need any more then?

A. No, sir.

Q. And in the commercial service if an accident happens they usually have air?

A. Yes.

Q. But in the other they don't do that?

A. No, sir.

Q. But switches are just as liable to be left open?

A. No, sir; more liable to be left open in the case of a road that has not skilled employés; there is no doubt of that.

Q. And there is more liability of the train leaving the track?

A. I don't doubt that.

Q. That is because the whole system is not so well conducted?

A. Yes.

Q. If you get right down to it, wouldn't you rather operate a commercial road that is more dangerous, even if there are more dangers in a commercial road, than this one.

199 A. I would not state it in that way—in that form—I don't believe it is true; the record will show what I think is more dangerous.

Q. Now, I say there is just as much or more danger from open switches—switches being left open in defendant's road than there would be in running a commercial road of like size?

A. In taking the length of road you state it is more likely switches

would be left open on the stripping road than on the commercial road.

Q. The operation of the engines in the defendant's road more nearly resembles the switching in a small yard?

A. Yes, it does.

Q. And usually in the operation of engines and switching cars, you have your switching crew?

A. Yes.

Q. And switch engine?

A. Yes.

Q. And generally a yardmaster?

A. Yes.

Q. And they move cars all around there and turn switches in various ways?

A. Yes sir.

Q. And the dangers are similar in that case to the defendant's case?

A. Yes, they are.

Q. I believe you have already said that other things being equal as to the size of the system, etc., that the dangers accompanying the work of railroad construction are substantially the same as the dangers accompanying defendant's work at the mine?

200 A. I don't think I made that broad statement.

Q. Assuming the system to be substantially the same size, using a couple of trains alternately to a place where they got dirt to where they dump, it is the same thing in principle?

A. The operations are similar, but I stated the dangers were greater on a commercial road on account of the greater weight.

Q. And that is eliminated if they build tracks in relation to it?

A. Yes.

Q. And if they do that the dangers ought to be the same?

A. Yes.

Q. If the construction company saw fit to use small engines and small cars the dangers would be the same?

A. It would be on the same basis.

Q. You can't compare this little road they had up here with your big system?

A. They are not alike.

Q. You don't know what they are in law of course?

A. I don't know what they are in law.

Q. And they ought to have skilled engineers?

A. A question.

Q. Men's lives are at stake?

A. Their own lives are; there is danger.

Q. There is the same element of danger, not the same degree, in this case from the lack of skill in the engineer as there would be on your own road?

A. Yes, there is.

201 Q. If they were doing their work as careful men should?

A. They require men of skill to operate these systems.

Q. If you were operating this system you would look for skilled men?

A. I believe I would.

Q. And when it comes to brakemen, as far as you have ascertained the work done on defendant's road, the brakemen ought to be men that could work on your road?

A. It is not necessary it should be.

Q. The testimony thus far has shown that they have a code of signals the same as you have on your road; in order to appreciate them you ought to be a skilled brakeman?

A. If there was the same system there should.

Q. When the engineer has to move his train he watches his brakemen so the evidence is, and the brakeman gives him the signal so? (Indicating)

A. Something like that.

Q. The signal where they move ahead something like that (indicating).

A. I believe so.

Q. The testimony is there was the same signal they have on other railroads?

A. If they are using the same system of signals, they ought to have ——

Q. And when they have a system of signals it makes it look more like a railroad to you, doesn't it?

A. Why it shows they are following approved methods.

202 Q. In other words they are operating small engines instead of your large engines, small cars instead of heavy cars and doing it upon the same system of signals as you are doing it, isn't the danger in their operation alike in operating your road aside from train dispatchers and things of that kind?

A. Yes, it is.

Q. And increases owing to the fact the grade is greater they use and the track not so well constructed?

A. There is more danger of derailment.

Q. And in case of a break more chance of cars running away?

A. Yes, sir.

Q. And in view of the fact they have not a complete and perfect system isn't there a likelihood of neglecting their duties?

A. Well, that is a question; I should say there was a probability.

Q. And train dispatchers if they are skilled men prevent rather than cause accidents?

A. Yes.

Q. And operating a train with an engine and twelve cars if there is not a conductor who could give the signal to move, that would be done by the brakeman?

A. Ordinarily.

Q. The brakeman for the time being takes his place if the conductor is not there?

A. Yes, sir.

Q. In operating trains of cars at such places as the Adams
203 mine, after the stripping is done,—that is done for the purpose of hauling the ore away?

A. Yes.

Q. And I presume this is true, that railroad companies sometimes haul direct from the mines?

A. It is.

Q. And in other cases the mines deliver their own cars to your road?

A. Yes, sir.

Q. In one case it is a private road and in the other it is your own railroad corporation?

A. Yes.

Q. And in the one case the load is put on to the cars with steam shovels?

A. Yes.

Q. And may be a train of 6, 8 or 10 cars?

A. Yes.

Q. And sometimes much less according to the grade?

A. Yes.

Q. And then they haul them out and deliver them to you gentlemen to haul away to Duluth?

A. Yes.

Q. And they are doing private work as if they were hauling out and dumping earth?

A. Yes, much the same.

Q. Isn't it the same in principle?

A. Yes, the same principle.

Q. They don't have any more cars or any more men; the danger is substantially the same?

A. Yes. It is about the same.

Q. And if they saw fit to haul small cars out with ore it would be the same thing?

204 A. Yes.

Q. There are narrow guage railroads in the country?

A. Yes.

Q. What is the size?

A. 36 inch.

Q. So they could take this same sized car if they wanted to do it, if it was profitable, dig their ore out with a steam shovel and haul it over to Duluth?

A. They couldn't haul it to Duluth.

Q. No reason why they couldn't operate a railroad on that principle?

A. There is no reason whatever, no.

Q. You can haul it away on the same principle as logs; they

often haul logs out of their own pineries and give them to the railroads and the railroads haul them to the mills?

A. Yes.

Q. And then again they take them to their own saw mills and the railroads don't touch them?

A. I don't know that they do directly.

Q. Powers-Simpson, don't they have a logging road 20 or 30 miles long?

A. I think they do; I don't know that they deliver logs direct to the mill.

Q. There is no reason why they couldn't haul on a small road with a small load?

A. Not at all.

Q. It would be railroading?

A. Yes, poor judgment.

Q. It would be poor judgment to haul a load of twelve cars
205 with two tons on the car instead of having big car and big loads?

A. Yes.

Q. But there is no difficulty in the thing being done, in your judgment?

A. No, sir.

Re-direct examination.

Mr. BILLSON:

Q. Counsel has asked you a series of questions about construction business on a commercial road two or three or four miles in length; do you know of any roads of that kind?

A. I do not.

Q. Isn't it a matter of fact there is a great variety of ways of hazards of railroad employés increasing with the length of the road—variety of traffic increases?

A. It does.

Q. Isn't it a fact that a commercial road for instance, produce- at the terminal points yards in which switches multiply in great numbers, a source of more or less peril to employés?

A. It is.

Q. Have you any idea of the number of switches that have to be turned in a yard like the Northern Pacific down at Rice's Point, down here?

A. I couldn't give you a definite number, but there are certainly over three hundred switches west of Lake avenue in the N. P. yard.

Q. On the line of road?

A. Yes.

206 Q. In reference to the derailment of these earth cars while owing to their construction and the narrow gauge &c., they

are more subject to derailment than the broad gauge and heavy cars, isn't it a fact that owing to there being no necessity for anybody being on the cars that the danger of the actual employés is much less?

A. That is what I testified to,—no man there to be hurt.

Q. Train dispatchers are undoubtedly useful, but isn't it a fact they are in the nature of necessary evils?

A. I am sorry to say it is so.

Q. Isn't it a fact that very large numbers of accidents are due to the telegraph service?

A. It is.

Q. You expressed the opinion that a large percentage of accidents to brakemen are due to their own negligence; is it true in reference to other railroad employés, engineers, trackmen and car men, conductors &c.?

A. It don't apply to all classes of employés; the section man is required in the performance of his duties to go over his section on his hand car; he necessarily assumes the dangers incident to going about curves, &c.

Q. But as a matter of fact how is it with reference to whether a considerable number of these accidents may be obviated if the trackmen had not been negligent?

A. A great many could.

Q. Are there not a variety of ways in which a brakeman
207 might suffer injury in the discharge of his coupling or other duties in regard to the negligence of his engineer?

A. Yes, there are occasions when the engineer will not answer the proper signal; instead of going ahead he would back up.

Q. And if he might back up more violently than he ought?

A. That is frequently the case.

Q. Is there not also negligence of trackmen in allowing things to remain on the tracks?

A. Yes, there is danger to all the trainmen on that account.

Q. What about there being danger to switchmen int he yards &c. from negligence—I mean to brakemen from negligence in switching?

A. There are greater dangers in the yards where switches are complicated, where trains are going back and forth where they are out of the vision of the employés; there are frequently accidents in Duluth from that source.

Re-cross examination.

Mr. ANDERSON:

Q. Now your attention has been called to these dangers existing in any railroading, in the Adams mine or anywhere else out of the negligence of the brakemen or switchmen, just the same as in the ordinary railroads you spoke of?

A. The same danger exists, not to the same extent.

Q. The extent depends entirely on the extent of your system, does it not?
208 A. Yes.

Witness excused.

E. B. RYAN, called on behalf of the defendant and being first duly sworn:

Mr. ANDERSON: We don't question Churchill making that statement.

Witness excused.

F. J. BULLEN called on behalf of the defendant, and being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Where do you reside?
A. Eveleth, Minnesota.
Q. How long have you been there?
A. Between three and four years, about three and a half years.
Q. What is your profession?
A. Physician and surgeon.
Q. Do you remember the circumstance of Mr. Kline being injured by the loss of his arm last 20th of April?
A. Yes, sir.
Q. Did you assist at the operation performed on his arm?
A. Yes.
Q. Who had the principal medical charge of his case after his operation until he left the hospital?
A. Dr. C. W. Moore.
Q. Did you assist at the operation?
209 A. Yes.
Q. To what extent did you see him after?
A. I dressed his wound every other day for several weeks.
Q. What, if anything, did you hear during your treatment of him of injuries to his back or knee or ankle, that you remember?
A. I remember that he complained of his back after his injury, while he was in bed and after he was up and around for awhile and walked with a cane for some time after and while he was in the hospital.
Q. Did you find upon him any evidence of bruises or injuries of any sort visible to the eye besides his arm?
A. We did not, no sir.

Cross examination.

Mr. ANDERSON:

Q. How long was it before he was out walking at all, out of bed?
A. Oh, he was able to be up in a chair I think within a week after the injury.
Q. When did you notice him walking round with a cane?
A. Well, he left the hospital about two weeks after he was injured and he was walking round some few days before that.
Q. How long after that did you observe him walking with a cane?
A. I am not positive.
210 Q. Did you see him around Eveleth walking with a cane?
A. Yes.
Q. Do you know how many weeks it was?
A. No, sir.
Q. Do you know why he used a cane?
A. He said his leg was sore.
Q. Did you pay any attention to the leg at the time you examined him?
A. I examined him at the time he was injured; I don't remember looking at his leg after that time.
Q. But when you saw him walking with a cane and complaining of being lame what did you do for him?
A. I told him I thought it would pass away.
Q. Didn't pay any attention to it?
A. No, sir.
Q. Or to his back?
A. No, sir.

Re-direct examination.

Mr. BILLSON:

Q. Did he make any further complaint about that and did he ask you to render any service to his back or leg?
A. He didn't ask me to render any service; I don't remember any complaint he made.

Witness excused.

211 S. D. PHELPS, called on behalf of the defendant, and being first duly sworn, testified as follows:

Mr. BILLSON:

Q. What is your business?
A. Surface foreman, Adams mine.
Q. About how long have you been acting in that capacity?
A. About four years, month of October.

Q. How long have you known Mr. Kline, the plaintiff here?
A. It will be four years next winter; sometime in the last three years; it was three years last winter since I first saw him.
Q. And how long have you known Mr. Churchill, George Churchill?
A. Somewhere last of March or first of April; I couldn't testify as to what day.
Q. Did you have a talk with Mr. Churchill on the day of this accident,—the evening of this accident?
A. I did. At the time also; at the time of the accident also.
Q. Well, did he say anything to you as to,—what was the talk at the time of the accident?

Mr. ANDERSON; I don't remember any foundation being laid for this testimony.
The COURT: That was in reference to a talk on the corner of the street.

Mr. BILLSON:

Q. Two conversations you say?
212 A. Yes, at the time of the accident.
Q. Did you have any further conversation with him that day?
A. Yes sir, that evening.
Q. Where was that?
A. At the corner of the city drug store.
Q. In Eveleth?
A. Yes, sir.
Q. Did he say anything there with reference to the circumstances under which the accident happened?
A. He did.
Q. What did he say on that subject?
Mr. ANDERSON: Whether this applies to the same conversation,——
The COURT: Yes, it was a conversation that took place at the corner of the drug store there in Eveleth; your inquiry was what did he say?
Mr. BILLSON: Yes, with reference to the accident.
The COURT: Well, this is impeachment; the inquiry would be—

Mr. BILLSON:

Q. Did he on that occasion state to you in substance that he had started to throw the switch but that Kline called him back to help him and if he had not he would have fixed the switch?
A. He did.

213 Cross examination.

Mr. ANDERSON:

Q. When was that conversation you allege took place?
A. Between seven and eight in the evening.
Q. On the 20th of April?
A. Yes, sir.
Q. Was it before or after you discharged Churchill?
A. It was after.
Q. When did you hire him back again?
A. That same evening.
Q. And he has been working for the company ever since?
A. Yes, to a week or ten days ago.
Q. He is working for the company yet?
A. Yes, up to ten days ago he was in the employ of the company.
Q. He has not left the employ of the company?
A. No sir; I understand he had a subpœna as a witness, the same as I have.
Q. What time in the evening was it you discharged him?
A. Along about 5:15.
Q. About seven he made this statement?
A. Yes.
Q. And you hired him back again?
A. I told him to return to work in the morning.

214 Re-direct examination.

Mr. BILLSON:

Q. Why did you do that?
A. I thought this way that he was no more to blame than the person that was injured, therefore I told him to return to his daily work again.

Re-cross examination.

Mr. ANDERSON:

Q. Then in your mind at the time you discharged him you laid the blame on Churchill?
A. I did at first.
Q. And you knew how the accident happened?
A. Yes.
Q. It was his duty to close that switch?
A. Yes.
Q. And he neglected that duty and that caused the accident?
A. Yes.
Q. It was his carelessness that permitted the train to come up there in the first instance?
A. Under those circumstances, yes.

Re-direct examination.

Mr. BILLSON:

Q. Has Mr. Kline worked for the company at any time since his injury?
A. Yes.
Q. When was that?
A. Round the first of July.
Q. And for how long?
A. I couldn't say; somewhere 12 or 15 days; I don't know
215 how many it was.
Q. At what compensation?
A. $2.25 a day.
Q. In what capacity?
A. Acting as surface foreman under my directions with a crew of men; had charge of a crew of men doing different kinds of work from place to place.
Q. Well, under what circumstances did he leave was he discharged or did he leave voluntarily?
A. He left voluntarily as I understand.
Q. Was he employed under you?
A. He was.
Q. Did you know of his being discharged?
A. He was not; not from me.
Q. You don't know of his being discharged by anyone else?
A. I don't think so, no.
Q. I wish you would state those days again; I have forgotten when he was employed?
A. From the first of July.
Q. Was he able at that time to be around and do his work without the assistance of any cane?
A. He was.
Q. Throughout all the time he was working?
A. Yes, sir.

Re-cross examination.

Mr. ANDERSON:

Q. How long did he work after the first of July?
A. 12 or 15 days.
Q. You didn't discharge him?
216 A. No, sir.
Q. Did you hire him?
A. I did.
Q. By whose orders?
A. My own; I told him to come to work.
Q. You don't know of your own knowledge why he didn't work for the company longer than that?
A. Certainly not.

Witness excused.

R. C. LASH, called on behalf of the defendant and, being first duly sworn, testified as follows:

Mr. BILLSON:

Q. Mr. Lash, what is your business?
A. Foreman of the stripping.
Q. At the Adams mine?
A. Yes.
Q. Were you so engaged on the 20th of April last?
A. Not that identical day.
Q. At that time were you so engaged?
A. Yes, sir.
Q. You were not on duty that day?
A. No, sir.
Q. How long have you known Mr. Kline, the plaintiff?
A. Well, I was not much acquainted, not till he started work on the dinky; I had seen him before.
Q. You knew him well at the time he was injured?
217 A. Yes sir.
Q. Did you meet Mr. Kline a short time after he came out of the hospital?
A. I did.
Q. How long was that probably after his injury?
A. I should judge he was about a week; I can't say to a day.
Q. You think he got out of the hospital not far from a week after he went in?
A. Yes sir, I think so.
Q. Where did you meet him?
A. On the main street of Eveleth.
Q. Did you have any conversation in regard to his injury?
A. I did.
Q. What, if anything, did he say in regard to it?
A. I spoke to him about Mr. Churchill, the brakeman; "It is clear," said I, "Ed didn't fire Mr. Churchill." I didn't know at the time that he had been fired, Churchill—Mr. Helps—"And why," Mr. Kline said, "I don't see why he should be fired; he was not to blame any more than I was." That was one part; we walked down the street further a short while after; let's see—I says to him, "But Mr. Churchill, how bad he felt; I never see a man so broke up as he was the night of the accident." Everybody liked Mr. Kline and I did myself.
Q. You spoke about how bad Churchill felt?
A. Well, he said he didn't need to feel so bad "it was my fault as much as his'n."
Q. Did you have any talk with Mr. Churchill, or were
218 you present at any conversation between Mr. Churchill and Mr. Helps at the time of the accident.
A. I was.
Q. Was that near the drug store at the corner?

A. At the corner of the street, drug store.
Q. In Eveleth?
A. Yes.
Q. State whether at that time and place Mr. Churchill said in substance to you and Helps or either of you that he had started to throw the switch but that Kline called him back to help him and if it had not been for that he would have fixed the switch?
A. That is about the words he used; he said "I started for the switch when Mr. Kline called me back and that caused the trouble;" he felt all broke up about it.

Cross examination.

Mr. ANDERSON:

Q. You say you expressed surprise to Kline that Ed had not discharged Churchill?
A. Yes.
Q. You made that remark at that time with full knowledge the accident had happened about the way it has been described here?
A. Yes, sir.
Q. And having that knowledge in your mind you were surprised he kept Churchill?
A. Yes.
219 Q. And at that time, a week or ten days after the accident?
A. This conversation; when I made that remark I didn't know that Mr. Helps had fired Mr. Churchill, not until the boys told me.
Q. But when was this conversation with Kline?
A. About a week after he was out of the hospital.
Q. There had been a good deal of feeling of pity for Churchill because he took it so hard?
A. Yes.
Q. And Mr. Kline expressed the same feeling?
A. Yes.
Q. And as far as you were concerned Kline tried to make Churhill feel as good as he could?
A. Yes, eased his mind.
Q. Trying to make it easier for him?
A. Yes.
Q. Kline felt very kindly towards Churchill for feeling so bad over it?
A. Well, it seemed so.

Re-direct examination.

Mr. BILLSON:

Q. Do you know anything about Kline's work for the company after he was injured?
A. Yes

Q. How long did he work?
A. That I couldn't say exactly; I was over at the pit.
Q. Did you see him about his work?
220 A. He gave me a pleasant visit at the pit where I was.
Q. Did you see him at his work?
A. Yes.
Q. Was he doing his work around without a cane or crutch?
A. He was.
Q. Did you notice whether he was limping or showing any signs of lameness at that time?
A. I didn't notice it.

Witness excused.

J. H. HEARDING, recalled on behalf of the defendant, testified as follows:

Mr. BILLSON:

Q. I meant to ask you a question in regard to these cars that were used in carrying timber and coal; how were they with reference to size and construction?
A. About the same length and width as the stripping cars and practically consisted of a stripping car truck without the box or pedestal; that was all boarded up.
Q. About how high?
A. About 24 inches above the rail.
Q. How about the coal cars?
A. There are two used; those in service at the mine stand in the yards and are a light steel car; the ones we occasionally take coal to the stripping with contain three yards of loose material
221 and are also a light steel car;, there are only about 12 inch wheels on the coal cars.
Q. I will ask you whether as far as you are aware Mr. Kline left the employment of the company voluntarily when he was working as foreman?
A. After his injury?
Q. Yes.
A. For all I know he did, yes, sir.

Witness excused.

Mr. BILLSON: I have here the original and copy of the articles of incorporation of the Minnesota Iron Company which I would like to offer in evidence; I would like to offer the original and with consent of counsel substitute a copy.
Mr. ANDERSON: I don't see how they are material.
Marked Defendant's Exhibit 4 and received without objection.
It is admitted that the original articles were filed with the secretary of state November 14, 1882, and with the register of deeds of Ramsey county, January 29, 1885.

Defendant rests.

MARK KLINE, recalled on his own behalf in rebuttal testified as follows:

Mr. ANDERSON:

Q. You have listened to the testimony of Mr. Lash?
222 A. Yes.
Q. You heard what he said with reference to a conversation you had with him about one week after you left the hospital?
A. Yes.
Q. He said that you told him in substance that "it was as much my fault," meaning yourself; did you hear him so testify?
A. Yes.
Q. State to the jury whether you made any such statement in words or substance or anything like that at that or any other time?
A. I did not, no, sir.
Q. Or to any other person?
A. No, sir.
Q. Why did you quit the employ of the defendant along in July?
A. They offered me this job over there and I went over and went to work; if they would come round and give me a fair settlement I was willing to settle; they would not do it; I quit.

Cross examination.

Mr. BILLSON:

Q. How did you find out they would not give you a fair settlement; what conversation did you have?
A. I didn't have much conversation with anybody whatever, only Mr. Helps come out and told me Windom wanted to see me and I would not go to see him.

223 Re-direct examination.

Mr. ANDERSON:

Q. Windom was at the works?
A. Yes, he was right there.
Q. And your idea was at that time that you had a claim against the company; you quit their employ; did it voluntarily; no words said?
A. No, sir.

Witness excused.
Plaintiff rests.
Case closed.

At this point proceedings were adjourned to September 22 at 9:30 a. m., at which time they were resumed as follows:
Mr. BILLSON: I move the court to direct a verdict for the defendant upon the ground that section 2701 of the General Statutes of Minne-

sota, 1894, if so construed as to be applicable to the defendant, is repugnant to the fourteenth amendment to the Constitution of the United States, as denying to the defendant the equal protection of the laws.

Second. To direct the jury to return a verdict in favor of the defendant upon the ground that section 2701 of the General Statutes of Minnesota, 1894, if so construed as to apply to the defendant, is repugnant to the constitution of the State and of the United States, as being class legislation.

224 Third. To direct the jury to return a verdict for the defendant upon the ground that any negligence of which any of the employés of defendant was guilty in connection with the matters referred to in the complaint, was the negligence of a fellow servant or fellow servants of the plaintiff and therefore not a valid basis for a recovery in this action, defendant not being affected by section 2701, General Statutes of 1894.

Fourth. To direct the jury to return a verdict in favor of the defendant upon the ground that the plaintiff is shown to have been guilty of contributory negligenee.

Motions to direct a verdict in favor of the defendant are denied.

The defendant requests the court to instruct the jury as follows:

Under the peculiar circumstances of this case it cannot be said as a matter of law that the plaintiff when he entered upon, or while he was engaged in, the repair of his engine, upon the occasion of his injury, was entitled to assume without inquiry or observation that the brakeman, Churchill, had properly adjusted the switch in front of his engine. Under the circumstances of this case it is a question of fact for the jury whether it was consistent with reasonable prudence and care to make such an assumption. (Given.)

If the jury should find that the plaintiff materially and proximately contributed to his own injury by even the slightest want of ordinary care, he cannot recover. It is not material in such
225 case that other servants of the defendant also contributed to the injury by negligence greater in degree. (Refused.)

Charge of the Court.

GENTLEMEN OF THE JURY: I had not intended to send you out tonight, but in view of the fact that we have yet sometime before five o'clock and those of you who are not talesmen will be required for jury duty tomorrow, I will give you the necessary instructions now. I hope you have constantly in mind, and have had from the beginning of the case, the true theory upon which these law suits are tried and upon which they should be determined, namely, that it is a studious and studied effort on the part of all concerned to reach the truth, to arrive at what is right and to do so without being interfered with or hampered by any considerations of favoritism for, or prejudice against, any of those that may be connected with the case.

In this particular action plaintiff alleges that while he was in the employ of the defendant as engineer upon a short line of railway connected with one of the defendant's mines at Eveleth, he was injured in the manner detailed by the evidence through the negligence of one of his co-employés, the witness Churchill, and that, by reason of such negligence, and of the injuries consequent thereon he is entitled to recover from this defendant. The defendant admits that the brakeman, Churchill, was negligent and that, in part at least, such negligence was the occasion of plaintiff's injuries, but it asserts that the plaintiff himself was negligent and that
226 by reason of such negligence which contributed, as they say, to cause his own injury, he is barred from recovery in this action. The question of the burden of proof is often an important one—always an interesting one. In this case the burden is, of course, upon the plaintiff to establish the extent of his injuries and to persuade you as to the amount he should recover, if at all, at your hands. It is admitted however, that he was injured as claimed and as already indicated that such injury was occasioned in part at least by the negligence of the man Churchill. The feature of contributory negligence which is asserted by the defendant as a matter of defense and which inures to its benefit is a matter in respect to which the burden of proof is upon the defendant, who asserts it; the defendant must establish the contributory negligence of the plaintiff, if any there was, by a fair preponderance of the evidence. It may do so either by affirmative evidence on its own behalf, or such contributory negligence may appear from the evidence introduced in favor of the plaintiff himself, in which case, if it does, it has the same force and effect as if established affirmatively by the defendant.

You are the exclusive judges of all questions of fact and the degree of credit you will give to the witnesses who have appeared and testified before you. As an agency for laying before you the facts relied upon by both parties it is your own recollection which must govern and determine what the evidence was on any particular point; it is your judgment which must control as to what has been es-
227 tablished and to what extent you will believe any witness. In determining the credibility of the witnesses you will take into consideration their appearance and demeanor upon the stand; the clearness with which they recollect the matters to which they testify; the probability or improbability of the stories which they respectively tell and their interest or lack of interest in the result of the case. These, with such other tests as suggest themselves to your good judgment will enable you to say in each particular case just to what extent you will believe such witness and what value you will allow to his testimony. You are expected in all these matters, gentlemen, to use a right judgment; you are not supposed to be novices, not to allow yourselves to be imposed upon by one side or the other, but with keenness of insight to see where the truth is and having seen it to register by your verdict where that is, governed by

the rules of the court and adopting such suggestions of counsel as commend themselves to you, for your assistance. You are not readily to conclude that any witness has knowingly testified falsely. If you can, consistently with sound sense you will reconcile all apparently conflicting statements either in the testimony of the same witness, or between his statements and those of another witness. If however, having made every reasonable attempt to reconcile all conflicting statements with the integrity of the witnesses, you believe any witness has knowingly and wilfully testified falsely, you are
228 then at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by other credible evidence.

The basis of the plaintiff's right of recovery in this case is the negligence of the witness Churchill, who, at the time of the accident, was an employé of the defendant. It is admitted that such employé was negligent and such negligence was in part, at least, the cause of the plaintiff's injury. Under the law of this State this negligence of the employé is to be imputed to the defendant—his negligence is its negligence—and if anyone is liable on account thereof the defendant is liable. But, although the brakeman, Churchill, was negligent and although such negligence was the cause of the plaintiff's injury, the latter is not for that reason alone necessarily entitled to recover, but he is entitled to recover unless he was himself negligent in such manner as contributed to produce his own injuries. Negligence in any particular case consists in a failure to exercise what, under the circumstances thereof, would be a proper degree of care. It was the duty of the plaintiff in this case to exercise ordinary care to prevent injury to himself. By ordinary care is meant such degree of care as an ordinarily prudent and careful person would exercise under the same circumstances. If at the time and place in question the plaintiff was not in the exercise of this degree of care, he was negligent and if such negligence contributed proximately in any material degree to produce his own injury he cannot recover whether the defendant was negligent or not. One of the very
229 important questions in this case therefor- for your determination is, whether at the time and place in question the plaintiff was in the exercise of ordinary care for his own safety.

This requires the exercise of a sound judgment on your part; all of these matters in cases of this kind call for the exercise of a sound judgment,—the composite judgment of twelve men is what is wanted and is called for. You are each supposed to aid the other in reaching just what is the right thing under these rules. You will recall all the evidence in the case having a bearing upon the question of his care or lack of care at the critical time about which we are concerned. You will recall the surrounding circumstances and conditions, the work in which he was engaged, the time at his disposal, the objects he had in view, his duties, both to his employers and to himself and apply your own estimate of what ordinary care, care under those circumstances and conditions, is, by a man of ordinary

care and prudence would be required, and you will say whether this plaintiff was then and there in the exercise of this care, or was he not. If plaintiff was negligent was not in the exercise of the proper degree of care and if such negligence contributed proximately to produce his own injury, he cannot recover and your verdict will be for the defendant. If, however, you find plaintiff was in the exercise of the proper degree of care he is entitled to recover and you will proceed to determine the amount which he shall be awarded. The plaintiff is entitled to recover, if at all, such sum as will fairly compensate him for the injury he has received, for the pain and suf-
fering which as a result thereof he has endured and for the
230 inconvenience which through life he must bear with as a re-
sult of the occurrences of that day. It is a question of compensation purely as near as human judgment can arrive at it; what is, under all the circumstances, the proper amount to award in cases of this kind. In the event that you reach this stage of the case. The idea is not that the company is to be punished for having knowingly caused these injuries and that smart money should be imposed to prevent a repetition of such offense, but without any such intention, the man having been injured and deprived, as he has been, what in dollars and cents do you say he should be awarded. There is no uniformity I suppose in the amounts different juries award in cases involving substantially the same injuries and yet there should be such uniformity because a sound judgment, if uniformly exercised, would arrive at substantially uniform results. You cannot concern yourselves with other cases particularly that I know of, but if you reach the question of what should be awarded him you must use your own good judgment and say what it should be, taking care not to be extravagant with other people's money, and, at the same time, not to be so careful of the interests of the one that the other should not be allowed what he is fairly entitled to receive.

I have adverted to the thought that you must not be influenced by any considerations which are incidental merely to the case; you have the evidence; you have these rules; now then, register your judgment in a way that you will be able continuously to approve
and which will approve itself to all right minded and sound
231 minded men.

Counsel for one of the parties has prepared a proposition of law with the request that you be instructed in accordance therewith. I am not sure that it has not, in part at least, been given you in the general charge; as far as it has, you will not understand it is the purpose of the court to emphasize any repetition. Bear in mind all the instructions without understanding that any part is emphasized more than another.

Under the peculiar circumstances of this case it cannot be said as a matter of law that the plaintiff when he entered upon, or while he was engaged in, the repair of his engine, upon the occasion of his injury was entitled to assume without inquiry or observation

that the brakeman, Churchill, had properly adjusted the switch in front of his engine. Under the circumstances of this case it is a question of fact for the jury whether it was consistent with reasonable prudence and care to make such an assumption.

It is for you to say whether he was then in the exercise of proper care or not. You understand the case is submitted to you on the theory that you may determine either one way or the other according as you believe and your judgment dictates.

When you have agreed upon a verdict you will have the same signed by your foreman, whom you will select from among your own number when you have retired to the jury room. Two forms of verdict will be taken by you, one in favor of the plaintiff
232 and one in favor of the defendant. In case you find for the plaintiff you will insert in the blank space left therefor the amount which you find him entitled to receive; in either case have the verdict signed by your foreman. If court is in session at the time you will immediately present yourselves in court; if not, you will seal your verdict, deliver it into the custody of your foreman and return with him into court when it is next in session to deliver the same.

I think perhaps gentleman, in view of the fact that the last case tried in this room resulted in a disagreement, I should call your attention to the fact that we want agreements in these cases and it is not the province of any juror to take upon himself the duties of an advocate either for the one side or the other. You are not the counsel on either side to espouse the cause of either one side or the other, but to maintain throughout an impartial and unbiassed character; seek for help from the suggestions of your fellow jurors and avoiding such pride of opinion as will not permit that being successfully accomplished. The twelve of you must agree in order that the result of these labors should be of value to anyone; see to it that your attitude from beginning to end shall be such that the result of your labors may be an agreement upon lines that are consistent with right and justice.

DEFENDANT'S EXHIBIT 1, SEPT. 21, 1903. C. H.

Name.	No.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Days	Rate	Amt.
Rich Rossiter	32	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	31		
Jno. Ryan	23	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	1	1	1	1	1	1	1	x	x	..	x	1	1	1	..	32		
Wm. H. Campbell	109	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	31		
P. J. O'Neill	795	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	..	30		
W. J. Byron	1536	.	.	.	.	.	.	.	.	.	.	.	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1	..	x	x	x	x	..	6½		
Rich Blight	12	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	..	30		
Mark Kline	57	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	x	x	x	..	..	..	..	..	..	..	..	..	..	..	19		
J. P. Campbell	315	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	x	x	x	x	x	x	x	x	..	1	1	1	1	..	30		
Ed Murphy	792	1	1	1	1	1	1	1	1	1	1	1	..	x	x	x	x	x	x	x	x	x	x	x	..	..	..	B 4/24					22		
T. E. Hood	64													x	x	x	x	x	x	x	..	x	x	x	x	..	..	1	1	1	1	..	11		
																																	242½		

233 *Articles of Incorporation.*

Know all men by these presents, that we, whose names are hereunto subscribed, do hereby associate ourselves together, in order to form a body politic and corporate under and in accordance with the provisions of chapter twenty-eight, being an act of the legislature of the State of Minnesota, entitled "An act to authorize the formation of corporations for mining and smelting ores, and for manufacturing copper and other metals," approved February 24th, 1875, and of the act of said legislature, entitled "An act to amend chapter twenty-eight of the General Laws of One thousand eight hundred and seventy-six (1876) relating to the formation of corporations for certain purposes," approved February 23rd, A. D. 1881, and of chapter fourteen of the General Laws of 1881, approved November 19, 1881, and to acquire and exercise the rights, powers, franchises and privileges in said several legislative acts named, and in order that the corporation hereby formed may accept the provisions and become entitled to the immunities provided in the act of the legislature of said State, entitled "An act to encourage mining in this State by providing a uniform rule for the taxation of mining property and products," approved November 29th, A. D. 1881; and we do hereby declare these presents to be the articles of association and incorporation by us adopted as follows, to-wit:

234 Article first.

The corporate name of this company is the "Minnesota Iron Company."

Article second.

The general nature of the business to be carried on by this corporation is mining and marketing iron ore and other ores and minerals and the refining and manufacture of iron and steel and other metals, and working and disposing of the same, and the construction of docks and warehouses, and the procuring of all buildings, fixtures and machinery deemed necessary for the conduct of said business, and also the buying and selling of, and dealing in, minerals and other lands in said State of Minnesota, and the acquisition and use of such property real and personal, as may be deemed necessary for said business.

The principal office of said corporation is to be in the city of St. Paul, Ramsey county, Minnesota, with the maintenance of a branch office at the city of Philadelphia, State of Pennsylvania for stock transfers and other purposes.

Article third.

The names and places of residence of the persons so associated and forming this corporation, are:

Charlemagne Tower, Philadelphia, Pennsylvania.
Edward Brietung, Negaunee, Michigan.
George C. Stone, St. Paul, Minnesota.
235 Charlemagne Tower, Jr., Philadelphia, Pennsylvania.
Richard H. Lee, St. Paul, Minnesota.

Article fourth.

The amount of the capital stock of this company is ten millions of dollars, divided into one hundred thousand shares, of one hundred dollars each, to be issued from time to time under the direction of the board of directors.

Article fifth.

The highest amount of indebtedness for which this company shall at any time be subject shall not exceed in the aggregate three millions of dollars, and such indebtedness or liability, beyond or exceeding one hundred thousand dollars in all for current business shall be created from time to time, and in amounts required, only by resolution of the board of directors, and approval thereof in writing by a majority in interest of the stockholders of the company, and not to be created or be of any vitality or force otherwise.

Article sixth.

There shall be five, or seven or nine, directors of said corporation, to be elected annually by the stockholders, at such time as may be provided in the by-laws of the company, and the number of such directors shall at each election, before the voting for them, be determined by a majority in interest of the stockholders then
236 voting, either personally or by proxy; and until the first of such annual elections the board of directors shall consist of Charlemagne Tower, Edward Breitung, George C. Stone, Charlemagne Tower, Jr., and Richard H. Lee. The officers of this company shall consist of a president, vice president, general manager, secretary and treasurer, to be elected annually by the board, and such other officers as the board of directors may from time to time provide; and until their successor- are elected, as provided by the by-laws to be adopted, the following persons shall be the officers of this company, to-wit:

Charlemagne Tower, president.
Edward Breitung, vice president.
George C. Stone, general manager.
Charlemagne Tower, Jr., treasurer.
Thomas L. Blood, secretary.

Article seventh.

The time of the commencement of this corporation is the first day of December, A. D. eighteen hundred and eighty-two, and it shall continue perpetually thereafter, as authorized by said legislative acts.

Article eighth.

There shall not be made any sale or sales, or lease or leases, of real estate of the company, except under resolution of the board of directors and approval thereof in writing by a majority in interest of the stockholders of the company.

237 In witness of all which, the said parties hereto, have executed these presents in duplicate, and subscribed with their respective names, and sealed with their seals, this ninth day of October, anno Domini, one thousand eight hundred and eighty-two.

CHARLEMAGNE TOWER. [SEAL.]
CHARLEMAGNE TOWER, JR. [SEAL.]
EDWARD BREITUNG. [SEAL.]

In presence of us,

WM. BROOKE ROWLE.
ANGELO T. FREEDLE.
J. A. BAILEY.

GEO. C. STONE. [SEAL.]
RICHARD H. LEE. [SEAL.]

In presence of us.

WM. R. MARSHALL.
J. H. GRUBER.
D. E. WOODBRIDGE.

STATE OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

Before the undersigned, a commissioner of deeds for the State of Minnesota, duly commissioned and qualified, this day personally came Charlemagne Tower and Charlemagne Tower, Jr., two of the persons named in, and who executed the above and foregoing articles of incorporation, to me personally known to be such, and severally acknowledged the execution thereof, and that the same is their voluntary act and deed for the purpose therein expressed.

In testimony whereof, I have hereunto set my hand and
238 official seal, as such commissioner, at the city and county aforesaid, this ninth day of October, A. D. 1882.

[SEAL.] J. A. BAILEY,
Commissioner of Deeds, &c., in Pennsylvania for Minnesota.

STATE OF MINNESOTA, } ss:
Ramsey County, }

Before the undersigned, a notary public in and for said county this day personally came Edward Breitung, George C. Stone and Richard H. Lee, three of the persons named in, and who executed the above and foregoing articles of incorporation, to me personally known to be such, and severally acknowledged the execution thereof, and that the same is their voluntary act and deed for the purpose therein expressed.

In testimony whereof, I hereunto set my hand and notarial seal of said county, at my office therein, this thirteenth day of November, A. D. 1882.

[SEAL.] WM. R. MARSHALL,
Notary Public, Ramsey County, Minnesota.

The foregoing exhibit is endorsed on the back as follows:

18663. Copy. Minnesota Iron Company. Articles of incorporation. December 1, 1882. Defendant's Exhibit 4, Sept. 21, 1903 C. H. Filed in my office at — o'clock — m. Sep. 23, 1903. J. P. Johnson, cl'k dist. court by H. A. Liedel, deputy.

239 STATE OF MINNESOTA, } ss:
County of St. Louis, }

GEORGE CHURCHILL, being first duly sworn, makes answer to the following questions, to-wit:

Q. What is your name?
A. George Churchill.
Q. Where do you live?
A. Eveleth is where I board; my home is St. Croix Falls Wis.
Q. What is your occupation?
A. Brakeman at present.
Q. Where are you working?
A. At the Adams stripping work.
Q. How long have you worked round the Adams?
A. 5 weeks, Saturday night, on stripping.
Q. How old are you?
A. 20 years.
Q. Were you working at the Adams mine April 20th, 1903?
A. Yes.
Q. Did you witness an accident that happened there to a man by the name of Mark Kline, April 20th, 1903?
A. Yes.
Q. What time of day did it happen?
A. I could not say positively; between 5 and 6 p. m.
240 Q. Wish you would go ahead, Mr. Churchill, and tell me exactly how it happened?

A. We were pushing the train. We had pulled up to the dump, and when we got to the upper switch, I got off, threw my switch for the passing track. My engineer pulled back and when he came back to switch, he asked me if I would help him fix brake. I said yes. We went to work and took out pin that holds the two brake beams together, and adjusted it to put it back. Then we pulled down into clear. After we got down to clear, other engine pulled down and about four of their cars jumped the track. Brake was not working right then and Kline says "We will fix the brake." I asked him if we would take coal and water, as it was close to 5 p. m. or a little after. Kline said we had plenty. He went on one side and I on the other. I held up brake shoe on side next main line a-d hind brake shoe and he was trying to adjust shoe. Just then Mr. Murphy pulled down with his train and Mark asked him if he would help him. Murphy then came and held the shoe on that side. Kline was there with his hand under trying to put that pin in and I was holding two shoes, one hand on one side and one on the other. I heard the train whistle off and just at the time they struck I looked aronnd over and rolled over next main line; soon as they struck I knew I had forgotten to throw switch. The engine just rolled over Kline's arm.

Q. When he asked you to help him fix brake shoe where were you?

A. I was up on dump first time and my switch was
241 throwed then all right for the passing track. We were not very far from that switch, just above it.

Q. Did you get on engine and ride down through the passing track?

A. I got on engine and rode right down to the point where accident occurred.

Q. Were you with the engineer all the time?

A. Yes.

Q. Was there anybody else to throw that switch besides you?

A. No.

Q. Under whose directions are you working?

A. I don't know.

Q. Do you take your orders from the engineer?

A. He has never given me any orders.

Q. Then why did you leave the switch and go help the engineer repair his engine?

A. Because I forgot the switch.

Q. Whereabouts were you on the engine when you came down on that passing track?

A. On foot board.

Q. When the train comes out from the steam shovel, do they ever take the passing track to go out on the dump?

A. No.

Q. How far was that engine from switch at time of collision?

A. I could not exactly say; between 150 to 200 feet.

Q. How many cars did train have that ran into you?
A. 12 loads.
242 Q. Which end was engine on?
A. Back end, pushing.

GEORGE CHURCHILL.

Subscribed and sworn to before me this 23rd day of April, A. D. 1903.

[SEAL.] EDWARD B. RYAN,
Notary Public, St. Louis County, Minnesota.

The foregoing having been examined by me is found to contain and to be a full, true and correct statement of all the evidence introduced and of all the proceedings had upon the trial of the cause within entitled and the same is hereby settled and allowed as the settled case herein.

Dated Jan. 28, 1904.

WM. A. CANT,
District Judge.

Settled case filed Feb. 29, 1904.

243 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

MARK M. KLINE, Plaintiff, }
vs.
MINNESOTA IRON COMPANY, Defendant. }

GENTLEMEN: You will please to take notice that upon the settled case heretofore allowed and approved herein, and upon the pleadings and all the files and proceedings in said cause, the defendant will at the opening of the special term of said court to be held at the court house in the city of Duluth on Saturday the 30th day of January, 1904, move the court that the verdict heretofore rendered in this cause may be vacated and a new trial granted, upon the ground that the said verdict is not justified by the evidence, and is contrary to law, and on the ground of the following errors in law occurring at the trial, to-wit:

(1.) The denial by the court of the following motion by defendant viz., to direct a verdict for the defendant upon the ground that section 2701, General Statutes of Minnesota, 1894, if so construed as to be applicable to the defendant, is repugnant to the fourteenth
244 amendment to the Constitution of the United States, as denying to the defendant the equal protection of the laws.

(2.) The denial by the court of the following motion by defendant, viz., to direct the jury to return a verdict in favor of the defendant upon the ground that section 2701 of the General Stat-

utes of Minnesota, 1894, is so construed as to apply to the defendant, is repugnant to the constitution of the State and of the United States, as being class legislation.

(3.) The denial by the court of the following motion of defendant, viz., to direct the jury to return a verdict for the defendant upon the ground that any negligence of which any of the employés of — was guilty in connection with the matters referred to in the complaint, was the negligence of a fellow servant or fellow servants of the plaintiff and therefore not a valid basis for a recovery in this action, defendant not being affected by section 2701, General Statutes of 1894.

(4.) The denial by the court of the following motion of defendant, viz., to direct the jury to return a verdict in favor of the defendant upon the ground that the plaintiff is shown to have been guilty of contributory negligence.

(5.) The refusal of the court to charge the jury as requested by defendant as follows, viz., if the jury should find that the plaintiff materially and proximately contributed to his own injury by even the slightest want of ordinary care, he cannot recover. It is
245 not material in such case that other servants of the defendant also contributed to the injury by negligence greater in degree.

(6.) In charging the jury, that under the law of this State, the negligence of the brakeman Churchill, the employee of the defendant, is to be imputed to the defendant, that his negligence is its negligence and that if anyone is liable on account thereof, the defendant is liable.

(7.) In charging the jury that if the plaintiff upon the occasion of his injury was in the exercise of the proper degree of care, he is entitled to recover.

Dated Duluth, Minn., January 28th, 1904.

BILLSON & CONGDON,
FRANK D. ADAMS,
Attorneys for Defendant.

To Messrs. Samuel A. Anderson and Albert Baldwin, attorneys for plaintiff.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

MARK M. KLINE, Plaintiff, }
vs.
MINNESOTA IRON COMPANY, Defendant. }

Order for Judgment.

At the close of the testimony taken upon the trial of the
246 above entitled action, the defendant made a motion that the court direct a verdict in its favor. Thereafter and on the

30th day of January, 1904, a motion on the part of said defendant for a new trial of the above entitled action came on to be heard before the court, Messrs. Billson & Congdon and Frank D. Adams, Esq., appearing in support of said motion and Samuel A. Anderson Esq., and Albert Baldwin, Esq., appearing in opposition thereto, and the court being now fully advised in the premises and being of the opinion that upon the whole record judgment should be entered in favor of defendant.

It is therefore ordered that notwithstanding the verdict of the jury in the above entitled action a judgment be entered therein in favor of the defendant, that the plaintiff take nothing by this action, and that the defendant recover its costs and disbursements herein.

Dated February 27th, 1904.

By the court,

WM. A. CANT, *Judge.*

(Filed in the office of the clerk of district court February 27, 1904.)

Memorandum.

"Section 2701, Gen. Stat. 1894, if literally construed, would include within its terms employees of every character engaged in any kind of service for railway corporations. To protect it from successful assault, on the ground of class legislation it has been held by our supreme court that it applies only to the peculiar hazards
247 incident to the use and operation of railroads; that it must be construed as designed exclusively for the benefit of those who, in the course of their employment, are exposed to such hazards, and whose injuries are caused by them. This test, though not universally followed in other States having similar legislation, has been adopted by the Supreme Court of the United States, but at the same time, and joined therewith, is found the consideration of the safety of the public—the idea that the dangers were incurred while in the performance of duties upon roads which had been open to the public use. The language in Missouri Ry. Co. *v.* Mackey, 127 U. S. 209 is as follows:

"'But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employés as well as the safety of the public.'

"This has been followed in the same terms by other cases in that court, and is an authority for looking to the public or non-public character of the roads as a basis of classification; as is also the case of Herrick *v.* Ry. Co., 31 Minn. 165.

"In this State the peculiar hazards incident to railway operation have always been made the controlling test, and finally the exclusive one in Schus *v.* Powers-Simpson Co., 85 Minn., 47.

"The proviso to sec. 2701 has always been somewhat troublesome,

Schneider v. Ry. Co., 42 Minn. 72. It has occasionally been invoked by defendants and construed by the court; but the only point
248 with reference thereto, which has been fairly presented or considered by the court, is whether the work upon which the employé was injured was in constructing part of a new road not open to public travel or use, within the terms of the proviso, or whether it was not.

"It is now urged for the first time that to preserve the act the construction must be that it is limited not only to those employés who incur the peculiar hazards incident to the use and operation of railroads, but also that the railroads and parts thereof to which it shall apply are those only which are open to public travel and use; that if it is not so limited, the proviso renders the act void, on the ground that it denies to the defendant the equal protection of the laws within the meaning of the fourteenth amendment to the Constitution of the United States, and also on the ground that it is void as class legislation under the constitutions both of the United States and this State.

"If defendant is right in either aspect of this contention, there can be no recovery in this case.

"It is plain that, taking the proviso literally, the construction placed thereon in the Schneider case (42 Minn., 72) is in strict accord with its terms. The proviso reads, 'a new road or any part thereof;' that is, of a new road. Taken literally, therefore, the proviso excepts from the operation of the body of the act only new roads or parts of new roads, and leaves the liability imposed by the act extending over construction work, such as building additional yard tracks, or straightening or reconstructing old lines, and defines
249 new lines to be those which have not been opened to public travel or use. It is possible that in a large view the proviso will admit of a construction which will limit the act to roads and parts of roads open to public travel and use, and thereby preserve its constitutionality in any event; on the other hand, it may be that the construction already adopted is unavoidable, and necessarily follows from a consideration of the language used, and that the only question fairly open either to the supreme court or to this court is whether, with that construction, the act is constitutional as against the points now raised. In any event, the only question which this court can properly consider is the constitutionality of the act assuming that the views of the supreme court heretofore expressed will be adhered to. If that body agrees with this court upon the constitutional question, it will modify its views upon the other branch of the case, if justified in so doing, or, if not so justified, will leave the matter to be remedied by appropriate legislation. The constitutional objections here relied upon were never before squarely urged or argued in this State and were never considered at all by the supreme court, so far as disclosed by our State reports.

"It is no doubt highly important and desirous that we have and preserve legislation such as the fellow servant act, socalled. It is

yet more important and desirable that our laws shall apply to all alike under the same circumstances and conditions. Moreover, the constitution wisely makes it necessary that they shall so apply. We are not to have one rule of liability for one man and an-
250 other rule for another under the same circumstances and conditions.

"Legislation is not obnoxious to this constitutional provision—the last clause of the first section of the fourteenth amendment, 'If all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed.' If they are not treated alike, such legislation is obnoxious to that provision. (Missouri Ry. Co. *v.* Mackey, 127 U. S. 209.)

"That constitutional provision intended that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.' (Barber *v.* Connolly, 113 U. S. 31.)

"Under the proviso forming a part of section 2701 where work of any kind is being done in the construction of a new road not open to public travel or use, there is no liability for injuries caused by the negligence of a co-employé. It is a matter of common knowledge that in such construction work equipments similar to those used by the defendant are in common use, and that the operations are carried on in the same way in every substantial particular. It is doubtless true that in many cases on railroad construction work the engines and cars are of standard gauge and heavier and more dangerous, therefore making the necessity for the application of a fellow servant act much more urgent in
251 such cases than in the one at bar. It is entirely possible that there might have been in the immediate vicinity of defendant's operations an exact duplicate of its equipment engaged in the business of constructing a new road not open for public travel or use; that there might have been the same number of men employed and precisely the same character of work to be done; that the haul might have been of the same length and upon the same grade and along similarly constructed tracks and switches. It is notorious that both the equipment and the operation in the two classes of work are often the same in every substantial particular. We may go further: The identical operations here involved and in the course of which plaintiff received his unfortunate injury, might actually have been in the course of putting through a cut in the construction of a new railway. The same operation would as readily excavate a cut on a new railway line as it would help uncover a body of ore. Under such circumstances, for injuries occasioned by the negligence of a fellow servant, the corporation constructing the new road could not be held liable. That being so, any attempt to hold the defendant liable under the same circum-

stances and conditions must fail. The burdens imposed and the privileges bestowed upon both must be equal. That the one is a road intended for public service, but not yet opened to public travel and use, while the other is one which never will be so opened is a distinction, but it is a distinction which has no possible relation to the reasons for or against the adoption of the fellow-servant act, or which will support a different application of the rule in the
252 two cases. Both are doing the same thing in the same way, under circumstances and conditions which are precisely alike. Under all the authorities the same rules of law must apply. If it is attempted otherwise we are introduced to a violation of the fourteenth amendment to the *Construction* of the United States already referred to. Any law which, on its face, has in contemplation the application of different measures of liability to separate men or sets of men doing the same thing under the same circumstances and condition- is void.

"Suppose two parallel and adjoining lines of railroad, such as we have in this county and in numerous other places throughout the State—one in process of construction and the other a completed and opened road. Assume that on their line they encounter a slough, which the old road originally built around, but which the new road proceeds to build across, and that at such time the management of the old road concludes to straighten out its tracks by also building directly across the slough alongside of the new road, which it proceeds to do, without in any manner interfering with the line as originally built. Assume that the two roads have separate equipments which are exact duplicates of each other the same number of men in each crew hauling dirt from the same bank, over roads which are of the same length and grade. Any law which attempts to impose a different measure of liability upon such companies, on account of injuries occasioned by the negligence of fellow servants in
253 the prosecution of such work by each, is void as belonging to a class of legislation so manifestly unfair as to have claimed the attention of a constitutional provision which expressly prohibits it. As in the other assumed case, a distinction may be made between the two companies, but it is a distinction which has no relation to the rule involved. When classification is attempted the classification shall be made upon some reason suggested by necessity, but such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' (Nicholas *v.* Walter, 37 Minn. 264).

"'Not only must it (special legislation) treat alike, under the same conditions, all who are brought within its influence,' but in its classification it must bring within its influence all who are under the same conditions.' Johnson *v.* Railroad Co., 43 Minn., 224.

"The section in question, through its proviso, under the construction which has been adopted, necessarily accomplishes the very thing which is so expressly prohibited.

"The remarks of Justice Gilfillan, as far back as the Schmeider case in the 42nd Minn., on page 72, wherein he reiterates the inability of the court to see any reasonable basis for the distinction made by the proviso in question was really a warning which has remained unheeded until this time. The proviso has always been a dangerous addition to the law and is not to be found in the statutes of other States.

254 "In my opinion the section as it stands can be preserved only by a construction which will limit it to roads and parts of roads open to public travel and use, and if that cannot be done the legislature should so amend the act as to *the* place that point beyond question, or should abolish the proviso altogether.

"During the time since this case was submitted, his honor, Judge Ensign, of this court has had under advisement the case of John Manwaring *v.* Drake & Stratton Company, Limited, involving substantially the same question as that herein considered. We have conferred fully upon the important questions involved and agree in the result reached. I have fully availed myself of his views in the preparation of this memorandum.

255 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

MARK M. KLINE, Plaintiff, }
vs.
MINNESOTA IRON COMPANY, Defendant. }

Notice of Appeal.

To Billson & Congdon and Frank D. Adams, attorneys for the above named defendant, and to clerk of the above named court:

Please take notice that the above named plaintiff, Mark M. Kline appeals to the supreme court of the State of Minnesota from the order of the above named defendant, entered and filed in the office of the clerk of said court on the 27th day of February, 1904, granting defendant's motion for judgment notwithstanding the verdict in said action, and from the whole thereof.

Dated this 2nd day of March, 1904.

SAMUEL A. ANDERSON,
ALBERT BALDWIN,
Attorneys for Plaintiff.

Service duly admitted.

256 13910.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent. } No. 157. Syllabus.

1. Schus *vs.* Powers-Simpson Co., 85 Minn. 447, construing sec. 2701, G. S. 1894, imposing upon railway companies liability to its servants for injuries caused by the negligence of fellow-servants, followed and applied.
2. The proviso at the end of that statute construed and held to fix a time when the act should be operative and have effect as to incomplete railroads, and not as indicating an intention on the part of the legislature to apply it to railroad companies engaged in public traffic only,

Order reversed.

257 13910.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent. } No. 157. Opinion.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant, in which plaintiff had a verdict in the court below, and from an order granting judgment for defendant, notwithstanding the verdict, plaintiff appealed.

The facts are as follows: Defendant is engaged in the business of mining iron ore, holding, among other properties, that known as the Adams mine situated near Eveleth, St. Louis county. In connection with its business it maintains and operates a railroad consisting of engines, cars and employees necessary to operate the same. It is a narrow gauge road; the engines are small and also the cars used thereon, the latter being of a dump car variety. At the time complained of the railroad and cars were being operated in the work of strippping the mine above mentioned. This work consisted in removing the earth from the surface by means of steam shovels,
258 depositing the same upon the cars, when they were run to a dump, a distance of about half a mile, and there unloaded and

returned to the mine. The entire track was about two or three miles in length. On the day in question two trains were being operated; as one was loaded at the mine and started on its journey to the dump to be unloaded, another train would be backed into the mine and in turn proceed to the dump when loaded. Engines were attached to both ends of each train, and the trains were operated at a speed of about six or eight miles per hour, and were thus run both day and night. Plaintiff was the engineer in charge of one of the engines attached to one of said trains; associated with him was a brakeman, who had general supervision in the operation of the train and did all necessary switching. The signals by which the trains were moved and brought to a standstill were the same as those used in ordinary railroad work. Plaintiff had been operating the engine in question for about two weeks prior to the time of the accident. At the time in question he backed to one of the switches intending to go upon a sidetrack, to permit the other train to pass, but some part of the engine refused to work properly, and he stopped for the purpose of making temporary repairs. He did not complete the repairs, however, but ran his engine down to the usual stopping-place, where he brought it to a standstill and again went about the work of repairs, which required him to go partly under his
259 engine with his tools. Before commencing this work he observed the brakeman going toward the switch to turn it so that the other trains could pass on to the dump with its load, and he supposed that he had performed that duty. But for some reason the brakeman failed to turn the switch and the approaching train came on with considerable speed, striking the cars to which was attached the engine on which plaintiff was at work, forcing the same over his arm and injuring it to such an extent that amputation was necessary, and bruising and wounding him in other respects. This action was brought to recover damages on the ground of the alleged negligence of plaintiff's fellow-servants, solely by reason of which plaintiff was injured. Plaintiff had a verdict for $5000, which was set aside by order of the trial court, and final judgment ordered for defendant on the ground, as we understand the memorandum of the trial court, that sec. 2701, G. S. 1894, as construed by this court in Schus *vs.* Powers-Simpson Co. 85 Minn. 447 is unconstitutional and void. The sole question presented by the briefs of counsel in this court is the validity of that statute as applied to defendant and the railroad operated by it.

The statute provides:

"Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent
260 or servant, without contributory negligence on his part, when sustained within this State, and no contract, or regulation between such corporation and any agent or servant shall impair or diminish such liability; provided that nothing in this act shall be so construed as to render any railroad company liable for

damages sustained by any employé, agent, or servant, while engaged in the construction of a new road, or any part thereof, not open to public travel or use."

This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the legislature to apply to "railroad hazards," and not to railroads as such; that the character of the employment was the test to be applied in determining its validity, and not the character of the employer. It was first construed in Lavallee *vs.* Ry. Co. 40 Minn. 249, where it was held that if the statute be held to apply to railroad corporations, as such, it would be invalid and unconstitutional as class legislation, for it is beyond the power of the legislature to single out a particular class of employers and impose upon them a distinct rule of liability for personal injuries; but if construed to apply to the character of the employment, the legislation was valid. It was accordingly held in that case that the legislature intended that it should apply to the hazards and dangers peculiar to the use and operation of railroads, and the decision there made has been followed in all subse-
261 quent cases. In the case of Pearson *vs.* Ry. Co. 47 Minn. 9, the court said:

"The construction of this act has been considered by us in several cases, in which we have invariably held that it applies only to the peculiar hazards incident to the use and operation of railroads, and was designed exclusively for the benefit of those who, in the course of their employment, are exposed to such hazards and whose injuries are caused thereby."

The language of Judge Mitchell in the case of Johnson *vs.* Ry. Co. 43 Minn. 222, very clearly states the rule which has since the Lavallee case been followed and applied in this State. He said:

"If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of their employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another for other employers, under like circumstances and conditions."

In Blomquist *vs.* Ry. Co. 65 Minn. 69, it was said:

"In order to sustain the law, we have, by judicial construction, limited its operation to those employees of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called "railroad dangers." But, as the general language of the act has been thus limited for the sole purpose of sustaining its validity we think it ought not to be limited further than is necessary for that purpose. We have held
262 that the test is not whether the conditions are in some respects parallel to those to be found in some kinds of business, or whether the appliances are, in some respects, similar to those used in some kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed

to the injury and which is peculiar to the railroad business, the statute applies."

Following the rule of these cases, we held in the Schus case that the test in interpreting and construing the statute was, not whether the corporation engaged in operating the railroad was organized as a railroad corporation, but whether the road being operated was a railroad, within the meaning of the term, in and about the operation of which employees were exposed to those dangers and hazards against which the legislature intended to provide. It was held in that case that the statute applied to the defendant, a lumber company, which owned and operated a logging railroad in the conduct of its private business. It was not engaged in transporting freight or passengers for hire; its operation of the road was limited exclusively to transporting logs to its saw-mill. The case was followed and applied in Roe *vs.* Winston, 86 Minn. 77, where the statute was held to apply to contractors engaged in the work of repairing the railroad, in and about which they had the use, and operated and controlled a work-train, consisting of an engine and numerous
263 cars, with engineer, conductor and brakemen, who were in fact employees of the railway company, but during the progress of this particular work under the control of the defendants, the contractors in charge of the work. So there can be no question, under the rule established by the various decisions of this court, and which has been adopted and applied to similar statutes in other States, that the statute to be constitutional must be construed to apply to all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against by the legislature.

It is urged with much earnestness by counsel for respondent that the effect of the proviso at the end of the statute has never been construed by any decision of this court, and it is insisted that the only meaning to be given thereto, consistent with the usual canons of statutory construction, limits the application of the statute to commercial railroads, and not to private roads, such as logging roads, or of the character of that shown in this case. The proviso reads that the act shall not be construed so as to render any railroad company liable for damages sustained by an employee while engaged in the construction of a new road, or any part thereof, not open to public use. It is claimed that this clearly shows an intention on the part of the legislature to limit the operation of the act to railroads open to public travel and use, and that private logging railroads
264 and similar railroads operated in connection with iron mines, not open to public travel, do not come within the statute. We do not concur in this contention. The proviso is in the nature of an exception or reservation and serves merely to exclude from the operation of the act railroads which are in course of construction, incomplete, and not open to use. It cannot be construed as enlarging or explaining the meaning of the enacting clause of the statute, and the mere fact that it excludes from the operation of the

act railroads not open to *public use* does not warrant the inference that the legislature intended the statute to apply solely to railroad companies organized for the purpose of doing a general commercial business, carrying passengers and freight for hire. The proviso simply exempts from the operation of the act the incomplete roads. Private roads, such as logging roads, or like that here under consideration, were unknown in this State at the time of the passage of the statute, and it goes without saying that the legislature did not intend to exclude them from the operation of the act; that class of roads has come into use since the enactment of the law, and, as held in the Schus case, are subject to the liability there imposed, at least when they are operating a road incident to which are the hazards and dangers contemplated by the legislature in the passage of the statute. The proviso must therefore be held, not as indicating an intention on the part of the legislature to single out railroad corporations engaged in pub-
265 lic traffic and impose upon them liability for injuries caused to one servant by a fellow-servant, but to establish a rule to protect employees in a hazardous and dangerous employment; and the exception of the incomplete road merely draws a line between the time when the act shall take effect as to the railroads in course of construction. When fully completed and ready for operation, whether public or private enterprises, if in their operation servants are exposed to "railroad hazards" the statute applies, and they are liable. Schneider *vs.* Ry. Co., 52 Minn. 72, was a case where the railroad company was engaged in the construction of a spur track, and in the course of its work in that behalf one of its servants was injured by reason of the negligence of a fellow-servant. The company was held liable, notwithstanding the fact that the spur track was but a part of its general railroad system, in the course of construction, incomplete and not yet open to public or other use. If there be any force in appellant's contention, the decision in that case was erroneous; but it was in line with the other decisions of the court to the effect that it was not the railroad corporations the legislature had in mind in passing the statute, but the hazards and dangers to which employees are exposed. It may be that there are expressions in decisions of this court, and other courts where this question has been discussed, to the effect that the welfare of the public was an element considered in the enactment of this
266 statute, and that it tends in large degree to insure the employment of experienced and skilled persons to manage and operate railroad trains, thereby better protecting the traveling public. But the statute has not been limited to employees operating trains, but has been applied to other classes of employees. In Steffenson *vs.* Ry. Co. 45 Minn. 355, the injury resulted from the negligence of a fellow-servant of plaintiff in the operation of a handcar; and the court held, though public interests were in no manner endangered or involved, that the case came within the purview of the statute and sustained the right of recovery. The rule of that case

has been repeatedly followed in others. Kreuger *vs.* Ry. Co. 83 Minn. 385. It follows that the construction of the statute as given in the Schus case must be adhered to; it is in harmony with all our other decisions, and the only construction the statute will bear, as we view it, which renders it free from constitutional objections. No particular class of employers are thus selected and made liable to their servants for the negligence of their fellow-servants, but a particular employment is made the basis of the legislation, and it is clearly within constitutional restrictions.

That the accident to plaintiff was the result of a risk and hazard incident to the operation of railroads, there is no question. He was engaged in repairing his engine; his body was partly under the car, and without notice or warning, by reason of the negligence
267 of the brakeman in charge of the train, his fellow-servant, whose duty it was to turn the switch for the approaching train, he was injured. The accident is one peculiar to railroad work, and the risk one within the meaning of the statute.

It only remains to consider whether in the operation of defendant's railroad its employees are exposed to the risks and dangers intended to be guarded against by the legislature. As before stated, the road was of the narrow guage style; the engines, of which defendant had five were small, each weighing about twenty tons; and the cars were small, so-called dump cars, but they were coupled and uncoupled precisely as other cars, and the trains were operated as trains on other roads are operated, with the same signals and the same general management and control. The employés in charge of and operating them were exposed to many, though perhaps not all, of the risks and dangers incident to the operation of railroad trains generally. It is true there were no handcars, no high embankments, no danger from excessive speed of trains; but the absence of some of these special risks is no reason for excluding the road from the operation of the statute, or distinguishing this from the Schus case. In the Schus case the railroad was nineteen or twenty miles in length, standard gauge track, large engines and cars; but in the operation of the trains many of the dangers and hazards immediately connected therewith were
268 the same as in the case at bar. And, so far as such dangers do exist, they are precisely similar to those surrounding those engaged in public traffic, though the operation of the latter is attended with many dangers and hazards to which the servants of defendant are not exposed.

Our conclusion is that the learned trial court was in error in holding that plaintiff was not entitled to recover, and the order made directing judgment for defendant, notwithstanding the verdict is reversed, and the cause remanded for judgment in plaintiff's favor on the verdict.

Order reversed.

BROWN, J.

269 I am thoroughly satisfied that the track and dump-car system employed by respondent in its mining operations, is not a "railroad" within the legislative intent of the fellow servant act.

The following elements, which constitute the extra hazard and risk as defined by all of the previous decisions of this court are absent in this instance. There was no dangerous rate of speed; the dump-cars were moved at the rate of six or seven miles an hour. There was no continuous movement of trains at a great speed or at heavy momentum. The system is simple and compact; the tracks, engines and equipment are of a diminutive character, such as employed to a greater or less extent by different corporations in the movement and disposition of earth and were in no sense used by respondent to carry on a railroad business such as is contemplated by the act. There is an entire absence of the risk incident to landslides, wash-outs, defective bridges, high embankments, and trestles, which require the constant attention of watchmen and a repairing crew at a distance and unknown to the other employés. There is an absence of the risk resulting from the defects and mistakes arising from the telegraph service and necessary dependence by such signals of one train upon the movements of another. The employés are all engaged in the same locality, and have the opportunity of becoming acquainted, and consequently there is an absence of that risk and hazard in connection with regular railroading which arises from the fact that employés are widely distributed and unknown to each other.

270 There is a vast distinction between the plant or system employed by respondent, and the logging railroad twenty-nine miles long operated by defendant in Schus *vs.* Power-Simpson Company, 85 Minn. 447, and if this plant, consisting of dinky engines and dump-cars, constitutes a railroad, within the meaning of the act, then I can see no stopping place between such a road and any track or tramway whereupon anything is conveyed on wheels by a moveable or stationary engine. There is no more hazard or risk in connection with the operation of the system now under consideration than the thousands of plants where a track is used to convey material and the propelling power furnished by a stationary engine and the cars are run by cable or gravity. While I am somewhat shaken in my views as to the result reached in the Schus case, yet it seems to me this case is not necessarily inconsistent therewith. We there held that the application of the act did not depend upon whether the road was a public commercial railroad or a private one; that in harmony with the preceding decisions of this court the distinguishing feature which made the act applicable, was the extra hazard and risk attendant upon carrying on the business, and that it was immaterial that the road was owned and operated by private parties for their own use. In that case heavy trains were moved with great speed, and under a system of signals and switches similar to those used on commercial roads, and while it may be difficult to

draw the exact line between that case and the one now before us, I believe that the border has been passed in this case, and that
271 at some future time it will be necessary for the court to retreat from its present position.

I therefore dissent.

LEWIS, *J.*

272 [Endorsed:] No. 13910. State of Minnesota, supreme court. Mark M. Kline, appellant, *vs.* Minnesota Iron Company, respondent. Opinion and syllabus. Filed July 22, 1904. C. A. Pidgeon, clerk. April term, A. D. 1904. Brown, J.

273 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent. } No. 157.

Pursuant to an order of court duly made and entered in this cause, on the 9th day of August A. D. 1904 it is here and hereby determined and adjudged that the order of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis be and the same hereby is in all things reversed

And it is further determined and adjudged that the appellant above named, do havr and recover of said Minnesota Iron Company, respondent herein the sum and amount of two hundred seventy-four and $\frac{90}{100}$ dollars ($274.90) costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement thereof.

Dated and signed this 9th day of August A. D. 1904.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	13.40
Printer's fees	226.50
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$274.90

274 [Endorsed:] 13910. State of Minnesota, supreme court. Transcript of judgment. Filed August 9, A. D. 1904. C. A. Pidgeon, clerk.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, C. A. Pidgeon, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol, in the city of St. Paul, this 9th day of August, A. D. 1904.

C. A. PIDGEON, *Clerk.*

275 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

MARK M. KLINE, Appellant, vs. MINNESOTA IRON COMPANY, Respondent. } No. 157. Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1904, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be and the same hereby is, in all things reversed and that the appellant above named have judgment accordingly.

Entered August 9th, A. D. 1904.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgement entered in the above entitled cause.

Attest: C. A. PIDGEON, *Clerk.*

276 [Endorsed:] No. 13910. State of Minnesota, supreme court. Copy of order for judgment. Filed August 9, A. D. 1904. C. A. Pidgeon, clerk.

277 STATE OF MINNESOTA :

Supreme Court, General April Term, A. D. 1904.

THURSDAY MORNING, 9:30 o'CLOCK, *July* 22, *A. D.* 1904.

Court convened pursuant to adjournment. All the justices being present.

MARK M. KLINE, Appellant,
vs.
MINNESOTA IRON COMPANY, Respondent. } Cal. No. 157, Reg. No. 13910.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above entitled cause.

Attest: C. A. PIDGEON, *Clerk.*

278 [Endorsed:] 13910 State of Minnesota supreme court. Copy of minutes of argument. Filed August 9 A. D. 1904 C. A. Pidgeon clerk.

279 [Endorsed:] No. 13910. State of Minnesota supreme court Mark M. Kline, appellant, against Minnesota Iron Company, respondent. Judgment roll. Filed August 9 1904 C. A. Pidgeon clerk.

280 STATE OF MINNESOTA,
State of Minnesota, Office of Clerk of Supreme Court, } *ss:*

Supreme Court.

I, C. A. Pidgeon, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said supreme court of the State of Minnesota, in the case between Minnesota Iron Company, respondent, and plaintiff in error, and Mark M. Kline, appellant, and defendant in error, including the opinion of the said supreme

court therein, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and that the foregoing constitutes a true and complete return to said writ of error.

In witness whereof I have hereunto set my hand and seal of said supreme court of the State of Minnesota at the capital, at Saint Paul, Minnesota, this 12th day of August, A. D. 1904.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIERCE,
Clerk of the Supreme Court of the State of Minnesota.

Endorsed on cover: File No. 19,809. Minnesota supreme court. Term No. 208. Minnesota Iron Company, plaintiff in error, vs. Mark H. Eliot. Filed September 5th, 1904. File No. 19,809.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
NOV 24 1905
JAMES H. McKENNEY,
Clerk.

No. 96.

MINNESOTA IRON COMPANY,
Plaintiff in Error,

vs.

MARK M. KLINE,
Defendant in Error.

Brief for Plaintiff in Error.

W. W. BILLSON,
FRANK B. KELLOGG,
JOSEPH B. COTTON,
Solicitors and Counsel
for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 96.

MINNESOTA IRON COMPANY,
Plaintiff in Error,

vs.

MARK M. KLINE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF CASE.

This action was brought in the District Court of Minnesota by the Defendant in Error, a locomotive engineer, against his employer, the Plaintiff in Error, to recover damages for the loss of an arm through its alleged negligence. Notwithstanding a verdict in favor of the plaintiff, the trial court ordered judgment in favor of the defendant (pp. 142, 143 of Record). On appeal, that order was reversed by judgment of the Supreme Court of the State (Fol. 155), whereby, so far as the State Courts are concerned, the cause was finally determined in

plaintiff's favor. The writ is for the review of this final judgment upon the ground that the defendant —the Plaintiff in Error—has been denied the equal protection of the laws, guaranteed by the Fourteenth Amendment of the Federal Constitution.

The Plaintiff confessedly lost his arm as he lay upon a side track, partly under his engine repairing it, by having his engine rolled over his arm, by the impact of a passing train which had been unexpectedly deflected from the main track through a switch negligently left open by a switchman, who admittedly was his fellow servant.

Aside from a question of fact which was determined in plaintiff's favor by the trial court, and which is not material here, as to whether plaintiff negligently contributed to his own injury by calling the switchman from his primary duties as switchman to help in the repair of the engine, the case turned on several questions arising upon a statute of Minnesota, modifying, as respects railroad employes, the common law rule as to the liability of an employer to an employe for the negligence of a fellow servant—a rule which, but for the said statute, would confessedly have barred recovery.

The statute, which constitutes Section 2701, General Statutes of Minnesota, 1894, being Chapter 13, General Laws of Minnesota 1887, reads as follows:

> "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sus-

tained within this state, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability; *provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use.*"

The facts of the case, so far as pertinent, were not the subject of materially conflicting testimony or of controversy, and may be summarized as follows:

The defendant company, a purely mining corporation, organized under the laws of Minnesota (p. 136), was operating certain mining leases upon lands constituting a portion of one section according to the government survey (p. 91), upon which the iron ore was so near the surface and of such structure that the economical method of mining it is to strip off the surface of clay so that the ore may be dug with steam shovels. To facilitate the stripping of the surface from this tract, the defendant mining company had constructed a narrow gauge temporary track from half to three-quarters of a mile in length, extending from the point of excavation to the dumping ground (Plaintiff's Testimony, pp. 15 and 24; Defendant's Testimony, p. 94). The main or central portion of this track had been built about a year, and shifted and rebuilt about five months prior to plaintiff's injury (p. 91), while the two ends were necessarily and continuously shifted and reconstructed from time to time as the exigencies of the work in the excavation

or pit at one end, and on the dump or fill at the other, might require.

Over this track there were operated day and night two dirt or dump trains, one leaving the cut or pit as the other left the dump or fill, and the trains passing each other at the central point where lay the side or passing track upon which plaintiff suffered his injury by the negligence of his fellow servant, the switchman, in failing to turn the switch (Plaintiff's Testimony, p. 15). The track was a narrow guage (p. 15); each train consisted of twelve cars (Plaintiff's Testimony, pp. 26, 27); the cars were about twelve feet in length, two or three tons in weight, with a carrying capacity of about three cubic yards (pp. 26 and 92); and the trains were hauled by small "dinky" engines weighing about fifteen tons (pp. 26, 56, 94). There were no brakes, except the steam brakes upon the engine, and as the trains moved back and forth as units there was no brakeman's service in coupling and uncoupling cars, except as occasionally it might become necessary to take a car out of the train for repairs (pp. 27, 93, 96, 108).

This stripping track had also been connected with an additional two or three miles of similar trackage previously constructed by the mining company upon the same lands, used for the purpose of distributing lumber, coal and other supplies required at the various shafts in carrying on the mining operations (Plaintiff's Testimony, pp. 29, 60, 61; Defendant's Testimony, pp. 90, 91, 97). No portion of the tracks used by the company either

for stripping or for supply distribution purposes, had ever been used for any other purpose, or by the public (pp. 91, 92).

The defendant company also claiming that as bearing upon the construction of the above quoted proviso of the State statute, it was a material circumstance, that at the time of the enactment of the statute of 1887, there were not within the state private railroads of any description, the only railroads then in the state being those built or in process of building for the purpose of carrying on business as comon carriers, maintained that of this historic circumstance for any bearing it might have on the construction of the statute, the court would take judicial notice; yet by way of precaution, introduced uncontroverted proofs of that fact, and of the fact that the class of private "stripping roads" and "logging roads" now found in the mining and timbered portions of the state had sprung up since the passage of the statute (pp. 104, 105, 106).

At the conclusion of the testimony, the defendant company moved the trial court to direct a verdict in its favor upon the grounds, among others, that the negligence of the switchman, being the negligence of the plaintiff's fellow servant, no recovery could be had on account of it, Section 2701 of the General Statutes of the state not being applicable; and that Section 2701, if so construed as to apply to the case, would be repugnant to the Fourteenth Amendment of the Constitution of the United States, as denying to the defendant company the equal protection of the laws (pp. 129, 130).

The inapplicability of Section 2701 to the case at bar was maintained upon two grounds, the first of which we suppose to be material, and the second not material, here: (1) that the proviso of the statute, when read in the light of the historic circumstance above mentioned, was manifestly and industriously so framed as to limit the operation of the statute to railroads open to public use; (2) that the tracks used by the defendant mining company like those used by manufacturers, warehousemen and miners generally, merely to facilitate the shifting of heavy objects from place to place on the premises where mined, made or handled, find their analogies in the derricks, cranes, slides, elevating devices, etc., employed for similar local purposes, rather than in the *"railroads"* of commerce; and that the dump cart stripping operations carried on by the defendant company upon its own mining premises, contrast so widely with ordinary railroad operations in points of speed and momentum of trains, and in the absence of hazards from high embankments, perils of land slides and washouts, of telegraphic train despatching service, brakeman service, hand car service and other prolific sources of ordinary railroad perils, that the stripping plant of the defendant company should not be deemed a railroad within the meaning of the statute (pp. 106, 110).

This latter point it seems appropriate to refer to, in explanation of some features of the record, although we assume it to be a point with respect to

which we are foreclosed by the determination of the state court.

The above quoted motions for a directed verdict in favor of defendant having been denied (p. 130), a verdict in favor of the plaintiff followed. Upon motion for a new trial the trial court changed its views, and as above noted, ordered judgment for defendant notwithstanding the verdict, upon the ground that the proviso of the statute, if so construed as to leave the defendant company within the operation of the statute would deny to it the equal protection of the laws; since with respect to "railroad perils" the stripping operations of the defendant company were in all respects identical with those of other corporations which it was the aim and effect of the proviso to exempt from the operation of the statute (pp. 143-147).

The final judgment of the Supreme Court of the State construed the statute as applicable to the defendant corporation, and as nevertheless constitutional, Lewis, J., dissenting (pp. 148-154).

ASSIGNMENT OF ERRORS.

The court erred in holding, that although the plaintiff was injured through the negligence of a fellow servant, the defendant was liable in damages by force of chapter 13, General Laws of Minnesota, 1887, entitled "An act to define the liabilities of railroad companies in relation to damages sustained by their employes," and in not holding that the said act if so construed as to be applicable to the injury suffered by the plaintiff, is repugnant to

the fourteenth amendment to the Constitution of the United States, as denying to the defendant the Minnesota Iron Company, the equal protection of the laws.

BRIEF FOR PLAINTIFF IN ERROR.

FIRST POINT.

THE STATUTE AS CONSTRUED BY THE SUPREME COURT OF THE STATE, DENIES TO PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

The sole circumstance relied upon to bring the defendant, a private mining company, under the operation of the statute, is that it used steam power trains in moving earth from cut to fill.

In doing this, the mining company was doing only that which is, more distinctly than anything else, the employment of those who, in the language of the proviso, are "engaged in the construction of a new road, or any part thereof, not open to public travel or use." Nor can suggestion be made of any respect in which typical railroad perils were more involved in the business which the plaintiff was assisting us to carry on, than they are habitually in the construction of new roads.

Thus the identical operation, the carrying on of which by a mining company upon its private premises, is held to be so characterized by the *presence* of "railroad perils" as by judicial construction to bring the mining company within the operation of a statute applicable in terms to railroad companies

only, is at the same time, when conducted by companies of the favored class described in the proviso, held to be so characterized by the *absence* of "railroad perils" as to justify the legislative exemption of the latter companies from the burdens of the statute.

It will be observed that had this injury occurred a few months earlier, when the main portion of our stripping track was under original construction, so that to the whole of it we could, unchallenged, have applied the talismanic word "new," no pretense of a right of recovery would have been made. No one would have question our right to the benefit of the proviso. The whole contention of the plaintiff resolves itself, on ultimate analysis, into the claim that we are liable, not because he was our employe in an extra hazardous business, but because we happened to engage him in it at the date of his injury, rather than six or eight months earlier when we were constructing the main bed of our track. What possible justification can the legislature have for saddling us with this liability merely because our movement of earth from cut to fill is held to have been upon an old rather than upon a new road? Is it not obvious that a new, in the sense of an incomplete road, is presumptively the most dangerous of all roads? The special exemption of incomplete or new railroads from a liability springing from the extra hazardous character of railroad operations, is palpably more irrational and arbitrary than a classification of railroads according to the color of the soil that they

workmen and to load slides in cuts and fills; the train service is more irregular and in every way less thoroughly systematized than upon roads open to public travel, nearly all trains being practically wild trains.

(2) Speaking generally, it is obvious that the statute makes no attempt to define the particular groups of railroad employes who are, or those who are not, sufficiently exposed to the perils of railroad operation to be entitled to its benefits. It is made applicable in terms to "any employé" of a railroad corporation. It does not even take notice by way of exception of the army of clerks, and workmen, which a railroad constantly employs. The theory of the act evidently was to result to the courts in each case the determination whether there was such a degree of exposure to railroad hazards as to fall within the scope of the statute. Is it not unreasonable to suppose that out of the great variety of railroad employes who are not so exposed as to be entitled to the benefit of the act, the legislature was strangely and inobservantly inspired to seek out this one and isolated group for express exception on that ground?

(3) However for ordinarily the court may deem it expedient to go in exercising more or less constitutional reasons as possibly underlying and justifying doubtful legislative discriminations, it would seem, for a reason hereinafter suggested, impossible for the court to uphold this restriction of remedy in this case. In order to do so, the court

must in one and the same breath, say that the carrying of dirt from cut to fill by steam cars, is a business so distinguished by the *presence* of railroad perils as to justify the court in stretching the letter of the statute in order to cover it; and that when carried on by the special favored class of corporations referred to in the proviso, the same operation is so characterized by the *absence* of such perils as to be legitimately exempted by the legislature from the operation of the statute.

(4) That the work of construction upon a new railroad involves in large measure the railroad perils with reference to which the statute was passed, cannot be, and we think is not, seriously, questioned by the learned counsel for the defendant in error. He is obliged to content himself with the assumption that whatever the measure of such perils may be, they were estimated by the legislature as so far distinguishable in degree from the perils of ordinary railroad operation that it was thought fit to introduce the proviso for their exception. But it is the settled meaning of the statute under repeated adjudications, reaffirmed in the case at bar, that "the test is not whether the conditions are in some respects parallel to those to be found in some kinds of business, or whether the appliances are in some respects similar to those used in some other kinds of business but that, if there is *any substantial element of hazard or condition of danger which contributed to the injury and*

which is peculiar to the railroad business, the statute applies."

Blomquist v. Great Northern Ry. Co., 65 Minn. 69, 67.

Kline v. Minnesota Iron Co., 93 Minn. 68, 67.

Page 150 of Record.

Is there nothing arbitrary in excepting construction work on new roads, merely because it might be deemed somewhat less hazardous than ordinary railroad operation, while enforcing the new statutory liability against all other roads whenever and wherever there is *"any substantial element"* of the dangers peculiar to railroad business?

(5) The irrationality of the distinction between new and old roads was acknowledged by the Supreme Court of the State in *Schneider v. Chicago, Burlington & Northern Ry. Co.*, 42 Minn. 68, 72, where the court say:

> "Indeed it would be hard to suggest any reason for the proviso, or for any difference in the liability of a railroad company, except such as might be based on the peculiar hazards attending the operating of engines and trains; hazards which exist whether the engines and trains are operating in constructing a new road or in using one already constructed. That these were the dangers the legislature had in mind in passing the act was, in effect, held in Lavallee v. St. Paul, M. & M. Ry. Co., 40 Minn. 249. We cannot see why the proviso should exclude injuries from such hazards in constructing a new road. But the legislature has seen fit to do so."

In that case no question of constitutionality was raised. In the case at bar, it will be observed by

reference to the opinion of the court (pp. 148-153 of Record) that the court does not essay to assign any possible reason for the discrimination made in the proviso, in response either to our strenuous contentions that it is arbitrary and irrational, or to the court's own former admission above quoted that such is the fact. The court contents itself, even in the face of the charge of irrationality, with pointing out that the legislature has so provided. Taking the two decisions together, the position of the court therefore seems to be, that the proviso is arbitrary and irrational yet constitutional.

We ask the court's attention to the fact, that this is not an instance of the trivial inequality which through accident or inadvertence is occasionally liable to attend classifications for any legal purpose. The entire proviso, if it has been correctly construed, was deliberately framed for the sole purpose of establishing the discrimination of which we complain. It creates an exception of substantial proportions, including all railroads in process of construction, of which class there are, of course, likely to be more or less representatives at all times.

An invidious distinction *in favor* of a single class, is as obnoxious to the equality clause as a similar discrimination *against* a particular class.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 554.

Nor is it necessary that the character of the discrimination or the attendant circumstances should

justify an inference of malice, ill-will or corrupt favoritism on the part of the legislature. It is enough that no rational basis for the discrimination can be discerned.

Smyth v. Ames, 169 U. S. 466.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 112.

In *Gulf Colorado etc. Co. v. Ellis*, 165 U. S. 150, 165, it is said, "that in all cases *it must appear*, not only that a classification has been made, but also that it is one based upon some reasonable ground," etc. At page 154, it is further and justly said: "While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action."

We are aware that there are many cases in which it has been deemed permissible by the court to formulate the scope of the equality clause in some such language as this: that "the constitution is satisfied if all similarly situated are treated alike;" or that it is only requisite that "the law shall operate equally or uniformly upon all persons in similar circumstances;" or that it is only necessary "that all persons brought under its influence are treated alike under the same conditions,"

Such statements as these evidently presuppose that the court is speaking of "situations," "circumstances" and "conditions" which appear to be similar when viewed with reference to all and only the facts, which have a just and reasonable relation to the discrimination complained of. They were not intended, and cannot be used, to detract from the elementary limitation that legal discriminatons cannot be based upon diversities of condition not logically and reasonably related to them.

Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150, 155, 165.

Magoun v. Ill. Trust Co., 170 U. S. 283.

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96

Lake Shore & Michigan South. Ry. Co. v. Smith, 173 U. S. 684.

Barbier v. Connolly, 113 U. S. 27, 31.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 552, 563.

(6) A brief reference to the decisions of the Supreme Court of the State of Minnesota, and of this court, upon this and other fellow servant statutes, will, we believe, make clear the position we take.

The first case in Minnesota bearing upon this question was the case of *Herrick v. Mpls. & St. Louis R. Co.*, 31 Minn. 12, in which the construction of a statute of the State of Iowa was involved. This statute was materially different from the statute of Minnesota in that it did not contain any such proviso. (See *Mpls. & St. Louis R. Co. v. Herrick*, 127 U. S. 211.)

At the same time this latter case was decided, this court decided the case of *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 206, in which it sustained the validity of a Kansas statute on the ground of the peculiar hazards of the business of operating a railroad. (Opinion, p. 210.)

These cases have no bearing whatever upon the question involved.

The first case where the Minnesota statute was considered was *Lavallee v. St. Paul, Mpls. & Manitoba R. Co.*, 40 Minn. 250, in which the court held that the Minnesota statute did not apply to a boilermaker's helper, injured in the defendant's shops in St. Paul, since he was not in the actual operation of the railroad. The court held that he was not subject to the peculiar hazards of the railroad business; and, had the statute been made broad enough to cover his case, it would have been unconstitutional. The court, at page 252 of the opinion, said:

> "'that the classification shall be made upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' Applying this test, it is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction."

The next case was *Johnson v. St. Paul & Duluth R. Co.*, 43 Minn. 222. The plaintiff was one of a crew of men repairing a drawbridge on its road, and was injured through the negligence of a fellow-servant in the same employment. The court, by Mr. Justice Mitchell, held, following the *Lavallee* case, that the act did not apply to this class of employment; that, had it so applied, it would have denied to the corporation the equal protection of the laws. The court cited the case of *Missouri Pacific R. Co. v. Mackey, supra*, decided by this court, and, summing up the discussion, said (Opinion, p. 224):

> "Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute, (*and on constitutional grounds there must be*), the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

In the case of *Pearson v. Chicago, Milw. & St. Paul R. Co.*, 47 Minn. 9, and *Holtz v. Great Nor. R. Co.*, 69 Minn. 524, the constitutional question was not involved. In one, the court held that the act did not include a member of a section crew loading railroad iron upon a flat-car; and the other, that the act did not apply to a person engaged in repairing cars in the company's shops. In *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, did not include street railways operated by cable or electricity.

In *Schus v. Powers-Simpson Company*, 85 Minn. 448—a case much relied on by the counsel for the defendant in error—the court held that an employe engaged in operating trains upon a logging railroad came within the statute. The case is clearly distinguishable from this case. While the logging road in that case was not open for general public business, it was to all intents and purposes a permanent railroad, wide gauged, operated with engines and cars of the standard size, and subject to most if not all the risks of railroad employment. But the question as to whether the Minnesota statute, thus constructed by the Federal court, denied to parties the equal protection of the laws, was not argued or decided. Some distinction might possibly have been made between the operation of trains on a logging road and the use of dump cars in grading and constructing a new railroad; but absolutely no distinction can be made between the risks of moving earth from a mine with a temporary track, dump cars and dinkey engines, and moving earth from a cut in construcing a new railroad, with the same appliances and in the same manner.

It will serve no good purpose for us to review the Federal authorities upon this question. It is sufficient to say that the decisions holding fellow servant statutes valid are clearly distinguishable from the case at bar. The statute in each case considered made a classification, based upon the peculiar hazards incident to the use and operation of railroads. In no case which we have been able

to find has such a classification as this been sustained; and, if it is once conceded that the legislature may make this classification, there is no limit to its power. It may make a railroad liable for the negligence of its employes in grading the railroad, and exempt a contractor in grading a street. It may make the employes of a corporation liable, and not those of an individual. This statute cannot, therefore, be brought within any of the rules laid down by this court.

Missouri Pacific R. Co. v. Mackey, 127 U. S. 205.

Tullis v. Lake Erie & Western R. Co., 175 U. S. 348.

Chicago, Rock Island & Pac. R. Co. v. Stahley, (Circuit Court of Appeals, Eighth Circuit), 62 Fed. 363-6.

Chicago etc. R. Co. v. Pontius, 157 U. S. 209.

SECOND POINT.

THE STATE COURT'S CONSTRUCTION OF THE STATUTE IS REVIEWABLE HERE.

In cases brought here from a state court, the rule seems to be general that the constructions placed by the state court upon the laws of the state, whether common or statutory, are reviewable here so far as necessary to determine whether the party bringing up the case has been denied by the state court any right or immunity secured to him by the constitution of the United States.

Gibson v. Mississippi, 162 U. S. 565, 591.

Atchinson, Topeka & S. F. Ry. v. Matheus, 174 U. S. 100 of Opin.

It was upon this principle that in *Yick Wo v. Hopkins,* 118 U. S. 356, 366, this court reviewed and reversed the construction placed by the Supreme Court of California upon certain ordinances of the City of San Francisco; the plaintiff in error there as here, claiming to have been denied by the state the equal protection of the laws.

So in *Chicago Burlington etc. Ry. Co. v. Chicago,* 166 U. S. 226, 248, this court reviewed all the rulings of the state court upon questions of law, so far as necessary to determine whether the plaintiff in error had been deprived of his property without due process of law, and among other matters (see page 248) passed its independent judgment upon the meaning of the state statute.

So in *Scott v. McNeal,* 154 U. S. 34, 44, 45, 47, 48, where the question was whether the plaintiff in error had been deprived of his property without due process of law by a premature adjudication of his death and consequent administration proceedings in the State of Washington, the right of this court to review the state court's construction of the state statute was asserted in analogy to the assumption of a similar power in cases involving the impairment of the contract clause of the federal constitution, and to cases involving the due faith and credit clause (p. 45). The court squarely placed its decision, holding the probate proceedings invalid, as well upon the ground that the state court had misconstrued the state statute (see pages 47, 48, 50) as upon the ground that the statute as con-

strued by the state court would be unconstitutional.

In the case of *Atchison, Topeka & Santa Fe R. Co. v. Matthews*, 174 U. S. 100, this court held that it was not concluded by the opinion of the Supreme Court of the State:

> "It forms its own independent judgment as to the scope and purpose of a statute; while, of course, leaning to any interpretation which has been placed upon it by the highest court of the State."

Although in such a case as that at bar it would be practicable for this court to enforce the equality clause by recognizing as conclusive the state court's construction of the state statute and by holding that the statute as so construed is unconstitutional, the case well illustrates the expediency of the other course, in case it should appear that the statute is valid apart from the misconstruction which is thus placed upon it. If the proviso has been made unconstitutional by judicial misconstruction, much less confusion would be entailed upon the law of the state, by a judgment of this court correcting the misconstruction, than by a decision invalidating the entire statute. It is moreover observable that since the equality clause is effective not only against the legislature, but against the executive and judicial officers of the state, the measure and kind of relief in many cases may depend upon this power of the court, not only to declare that the equality clause is being violated, but to definitely

locate the offending organ or agency of the state government.

THIRD POINT.

IT WAS THROUGH A MISCONSTRUCTION OF THE PROVISO, THAT PLAINTIFF IN ERROR WAS DENIED ITS BENEFITS BY THE STATE COURT.

The statute and its proviso should be read *in the light* of the railroad business as known to Minnesota and its legislators when in 1887 the statute was framed and enacted. *Funk v. St. Paul City Ry.*, 61 Minn. 435. At that time there were no *private railroads* known to Minnesota, her business or her laws. This fact is not disputed. It is undoubtedly a fact of which, *for the purpose of interpreting* the statute, the court must take judicial notice. To obviate any question about that, however, we introduced the best of testimony to establish the fact (pp. 104-107 of Record). The fact is recognized by the State Court (p. 152 of Record).

The only private plants ever built in the state, which would be claimed to be railroads within the statute, are the logging roads and mine stripping plants built in the northern part of the state since 1890.

In 1887, therefore, when the statute was enacted, the only railroads known to the state which were not open to public use, were *new public railroads* not yet open to public use because their construction was not far enough advanced. From the na-

ture of the case, also, the only employes upon railroads so conditioned must have been those that were engaged in their construction (p. 106 of Record).

It is therefore manifest that the legislature sedulously so framed the statute, that as the railroad business was then known to the state, it would be applicable to all the operatives of all railroads open to public use, and inapplicable to any of the operatives of any railroad not open to public use.

It was by a mere accident of language, that in aiming at that result, the legislature instead of excepting in general terms employes upon roads not open to public use, proceeded by way of sheer surplusage of concreteness and specification, to *describe* the only kind of railroads then known to the state not open to public use, viz: new or unfinished public railroads, and to name the only possible class of employes upon roads so circumstanced, to-wit: employes "engaged in construction." *As things then stood, that was only an apparently more specific way of saying that the act should not apply to roads not open to public use.* But manifestly the legislative intent to draw a straight line between the roads that were, and those that were not, open to public use, is not to be defeated by the subsequent introduction of a new kind of road, not open to public use, which was not, and could not be, *specifically* described in the *proviso* for the very good reason that it was not then known. Being new it must, following the principle of the original statutory classification, be placed within or with-

out the line of statutory liability according as it is or is not open to public use.

The failure to observe the pregnant historic fact, that as matters stood in 1887, the proviso was an exhaustive description and exception of *all* the employes that there were upon roads not open to public use, has resulted in this: that the proviso instead of being used as a key to the object and policy of the law, as it should have been, has, despite the strong presumption of legislative rationality in which the courts ought to indulge, been regarded as arbitrary and inexplicable. *Schneider v. Burlington R. R. Co.*, 42 Minn. 68, 72. Nothing like our *proviso* occurs in the statute of any other state, except in that of North Dakota, which is a copy of ours. In its absence from other statutes, courts have been left free to speculate as to the legislative *reason* for discriminating by statute in favor of railroad employes, and have generally ascribed the discrimination to the peculiar and extreme perils of the railroad service.

But our *proviso* avouches unmistakably that if the courts generally have correctly interpreted the principle of the railroad fellow servant statutes, the policy of our statute is peculiar. *For our statute, when applied to conditions existing at the time of its passage, proceeds upon the principle that no kind or degree of peril to a railroad employe shall be adequate to effect a relaxation of the common law rule, unless the conditions are such that the general and traveling public is actually or presumptively more or less threatened by the*

same act of negligence which threatens the employe. In other words it is only where the considerations that the co-employe might urge in favor of a relaxation of the common law are supplemented or fortified by considerations affecting the general safety, that the legislature has been willing to relax the common law.

The reasoning thus implied in the statute is moreover, eminently sound. Nearly every railroad accident, though in fact affecting only an employe, is loaded with possibilities of appalling disaster to the public using the road. The public is interested in stimulating to the highest degree of care and efficiency the railroad service. And just as the legislature might, in pursuit of that end, impose a penalty upon railroad companies for every act of negligence in its employes whether resulting in injury to any one or not, so they may *wholly or partly, in the interest of the general public,* repeal in the case of railroad service the rule of non-liability for negligence of fellow servants, as being, in view of the peculiar character of that service, against public policy.

That legislation of this character is designed for the joint benefit of the employe and the public was recognized by Field, J., in *Mo. Ry. Co. v. Mackey,* 127 U. S. 209, 210, and by Lochren, J., in *Williams v. Northern Lumber Co.,* 113 Fed. Rep. 382, 385. See also *Herrick v. Ry.,* 31 Minn. 11.

The judgment should be reversed upon the ground that by the statute or by the state court's

erroneous construction of it, the plaintiff in error has been denied the equal protection of the laws.

W. W. BILLSON,
FRANK B. KELLOGG,
JOSEPH B. COTTON,
Solicitors and Counsel
for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 368.

MINNESOTA IRON COMPANY,
Plaintiff in Error,

vs.

MARK M. KLINE,
Defendant in Error.

STATEMENT OF FACTS.

Plaintiff in Error is an iron mining corporation, engaged in the business of mining iron ore, and holding, among other properties, that known as the Adams Mine, situate in St. Louis County, State of Minnesota.

It owned and operated steam shovels and a narrow gauge railroad, with five small locomotive engines and many cars, the latter being of a dump car variety, using these in the work of stripping the surface of the earth from the bed of iron ore. The railroal track, including side tracks, passing tracks and spurs, was about three miles in length. The

main line was about one-half mile, in length, and there were about fifteen switches, connecting the various tracks to each other. At the time of the accident two trains, consisting of two locomotives and twelve cars each, were being used by plaintiff in error. Each locomotive weighed about fifteen tons, and each car, when loaded about three tons. These trains were run at a speed of from six to ten miles per hour, passing each other on side or passing tracks. There were two locomotive engineers and two brakemen with each train, and there were about forty men engaged in the operation of stripping the mine at the time of the accident, working day and night. The trains were run in alongside the steam shovel where they were loaded, and from thence were run out over the main line to what was called the dump, there to be unloaded. (See printed record, pages 15, 28 and 29 as to length of tracks; page 26 as to weight of engines and cars; page 15 as to size of trains and method of handling; page 29 as to number of switches and engines; page 29 as to number of trackmen.) The code of signals ordinarily used on commercial roads in Minnesota were adopted and used in the operation and use of this system (See printed record, pages 30 and 50). The cars and engines were equipped with the ordinary link and pin coupling apparatus (See printed record, page 27). The testimony disclosed that the trainmen, switchmen and trackmen were exposed to the same perils and hazards as are men performing like service on commercial railroads, the only difference being in the degree and number of such

risks or hazards (See printed record, pages 30, 31, 32, 58, 113, 115, 116 and 117).

The defendant in error was a locomotive engineer in charge of one of the engines, and on the 20th day of April, 1903, he suffered the loss of one of his arms, through a collision of one of the trains with his engine, caused by the carelessness of a fellow servant in failing to turn a switch, and brought this action to recover damages.

His case was tried in St. Louis County, Minnesota, and resulted in a verdict in his favor. This verdict was afterwards set aside by the trial court on the ground, substantially, that, owing to the fact that the Supreme Court of Minnesota had held the statute hereinafter referred to applicable in such cases, such ruling rendered the whole statute unconstitutional as class legislation. The state Supreme Court, on appeal, reversed the lower court, and ordered judgment in favor of the plaintiff, defendant in error in this court.

Plaintiff in error contends that the Supreme Court of Minnesota erred in not holding that Chapter 13, General Laws of Minnesota, 1887, entitled "An Act to determine the liability of railroad companies in relation to damages sustained by their employes," if so construed as to be applicable to the injuries suffered by the defendant in error, is repugnant to the Fourteenth Amendment to the Constitution of the United States, as denying to the plaintiff in error the equal protection of the laws. (See printed record, page 4.)

The statute in question reads as follows:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, and no contract, rule or regulation between such corporation and any agent or servant, shall impair or diminish such liability.

Provided, That nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent or servant while engaged in the construction of a new road or any part thereof, not open to public travel or use."

ARGUMENT AND AUTHORITIES.

CHAPTER 13 GENERAL LAWS OF MINNESOTA, 1887, CONSTRUED AS APPLICABLE TO PLAINTIFF IN ERROR, IS CONSTITUTIONAL AND NOT REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS DENYING TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

"The national courts uniformly follow the construction of the Constitution and statutes of a state given by its highest judicial tribunal in all cases which involve no question of general or commercial law, and no question of right under the Constitution and laws of the nation."

Kibbe v. Stevenson Iron Mining Co., 136 Fed. 147.

Bolles v. Brimfield, 120 U. S. 759, 763.

Detroit v. Osborne, 135 U. S. 492, 499.

Gut v. The State, 9 Wal., 35, 37.

Fairfield v. County of Gallatin, 100 U. S. 47, 50 and 52.

Bank of Hamilton v. Dudley's Lessee, 2 Peter 492.

Union National Bank v. Kansas City, 136 U. S. 223, 235.

It necessarily follows that, the Supreme Court of Minnesota having so construed this statute as to make it applicable to the plaintiff in error, and having held it to be constitutional under the State Constitution, the judgment of that Court must stand, unless the statute, so construed, is in violation, of the Fourteenth Amendment, as denying to the plaintiff in error the equal protection of the laws.

MEANING AND SCOPE OF CHAPTER 13 GENERAL LAWS OF MINNESOTA, 1887, AS CONSTRUED BY THE SUPREME COURT OF MINNESOTA.

This statute, and statutes of like character, in other states, were bitterly opposed by railroad corporations on the ground that they invaded their constitutional rights, taking from them liberty of contract, depriving them of their property without due process of law, and on the ground that they were partial or class legislation. But the State Courts and this Court have uniformly held them to be valid. Some Courts sustained the statutes as valid and applicable to railroad corporations merely as such, holding that, in view of the fact that such corporations were quasi public corporations,

exercising public franchises, such statutes were a proper exercise of the police power of the state. But the Supreme Court of Minnesota upheld the constitutionality of the statute in question by limiting its operation to that class of railroad employes that is exposed to the hazards and dangers incident and peculiar to the actual operation of railroads.

Thus, in Lavallee v. St. Paul, Minneapolis & Manitoba Ry. Co., 40 Minn., 249, the court held that, although the statute included all employes of a railroad corporation, if taken literally, nevertheless, it could not be read literally for the reason that it would then be what is sometimes called "Class Legislation," imposing upon one class of persons liabilities from which other persons in precisely the same circumstances are exempt. The court say on page 252:

"Of course, the legislature must have the power to classify, when necessary, subjects for legislation, and make provisions for subjects within one class, without making them applicable to subjects in another; and the proper exercise of that power is not liable to the objection that it is class legislation. The practical limitation of the power to classify so as to avoid the imputation was stated by this court in Nichols v. Walter, 37 Minn. 264, as 'that the classification shall be made upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.'"

The court then goes on to state that the frequency and magnitude of and difficulty to avoid the dangers to which those employed in operating railroads

are exposed, and the great number of men employed and inability of employes to become acquainted with and to know each other, or to become familiar with their competency, skill or care, are sufficient reasons for applying a rule of liability on the part of the employer to the employe so employed different from that ordinarily applied between master and servant.

The interpretation here adopted has been uniformly adhered to by the Supreme Court of Minnesota.

Schneider v. C. B. & N. Ry. Co., 42 Minn. 68.
Johnson v. St. P. & D. Ry. Co., 43 Minn. 222.
Pearson v. C. M. & St. P. Ry. Co., 47 Minn. 9.
Steffenson v. C. M. & St. P. Ry. Co, 45 Minn. 355.
Mikkelson v. Truesdale, 63 Minn. 137.
Blomquist v. G. N. Ry. Co., 65 Minn. 69.
Kreuzer v. G. N. Ry. Co., 83 Minn. 385.

In Johnson v. St. Paul & Duluth Ry. Co., *supra*, the court say, on page 223, that the statute "applied only to the peculiar hazards incident to the use and operation of railroads; that it must be construed as designed exclusively for the benefit of those who are in the course of their employment exposed to such hazards, and whose injuries are caused by them." And again, that, "If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railroad companies, merely as such, and another rule

for other employers, under like circumstances and conditions." And again, on page 224, the court say, "Our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute, (and on constitutional grounds there must be,) the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

In the case of Blomquist v. Great Northern Ry. Co., *supra*, the court say: "In order to sustain the law, we have, by judicial construction, limited its operation to those employes of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called 'railroad dangers.'" And again, "We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are, in some respects, similar to those used in some other kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies."

It will be seen from these decisions that the nature of the employment is the test to be applied in construing the statute, that the character of the employer is not of controlling importance, and that the subject matter of the statute, and its intent and purpose, were to protect employes exposed to great

and peculiar hazards; that it is not necessary that all the elements of hazards or conditions of danger should be present, but that it is sufficient if there is present any element of hazard or condition of danger peculiar to the operation of a railroad and which contributed to the injury.

This is the rule adopted in the states of Iowa and Kansas. In Deppe v. Chicago, Rock Island & Pacific Ry. Co., 36 Iowa, 52, the court say:

"The manifest purpose of the statute is to give its benefit to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional. When extended further it becomes unconstitutional."

See also Missouri Pacific Ry. Co. v. Haley, 25 Kan. 35, and Union Pacific Ry. Co. v. Harris, 33 Kan. 416.

LOGICALLY AND ON CONSTITUTIONAL GROUNDS THE STATUTE WAS NECESSARILY HELD TO BE APPLICABLE TO PERSONS OR CORPORATIONS OPERATING RAILROADS IN THEIR OWN PRIVATE BUSINESS, WHERE THEY EXPOSE THEIR EMPLOYES TO HAZARDS AND DANGERS OF LIKE CHARACTER TO WHICH EMPLOYES OF COMMERCIAL ROADS ARE EXPOSED.

The Supreme Court of Minnesota, when called upon for the first time, in 1902, to decide whether or not the statute was applicable to persons or companies operating railroads in their own private business, not carrying passengers or freight for hire, held that the statute was applicable and valid as so applied.

Schus v. Powers-Simpson Co., 85 Minn. 447.

It was there contended that the statute did not apply to the defendant because it was not organized as a railroad corporation, and for the further reason that it was not engaged as a common carrier of passengers and freight. The court say, on page 450, that, within the reasoning of former decisions,

"the test in interpreting and construing this statute, is not whether the corporation engaged in operating the railroad was organized as a railroad corporation, but whether the road being operated is a railroad, within the ordinary meaning of the term, in and about the operation of which employes are exposed to those dangers and risks against the consequences of which the legislature intended to provide."

And again, on page 451:

"the subject-matter of the statute under consideration, and its intent and purpose, were to protect employes engaged in a dangerous and hazardous employment; and, within the decisions cited, the character of employer is not of controlling importance. The statute is to be given, if not a liberal, at least a reasonable, interpretation, and one that will carry into effect the intent of the legislature. If the character of the employer, within the meaning of the statute, is not important, and the nature of the employment is the test to be applied in construing the statute, the expression 'any railroad corporation engaged in the operation of a railroad' should, within the rule laid down by Sutherland, be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad, incident to which operation are the dangers and hazards from which the legislature intended to protect the employes."

On page 452 the court say:

"It is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope, coming into existence subsequent to their passage. And within this rule, even though defendant is engaged in operating a 'logging railroad' only, and exclusively in the interests of its private affairs, and though such railroads were not known at the time of the passage of the statute, and consequently not then in the contemplation of the legislature, the operation of its road, in respect to the dangers and hazards to which its employes are exposed, brings it squarely within the spirit and purpose of the law; and it must, to effectuate fully the intention of the legislature, be held to be within its scope and operation.

The spirit and purpose of the statute must be looked to in determining its scope and application; and as the spirit and purpose of this law was the protection of employes engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to employes the legislature intended to provide against."

The same court in Roe v. Winston Bros., 86 Minn. 77, was called upon to interpret a similar statute in Wisconsin, as applied to a railroad used in construction work, and it held the statute applicable and constitutional as so applied.

The next decision, in the order of time was the case at bar. But on March 6, 1905, the United States Circuit Court of Appeals, Eighth Circuit, decided the case of Kibbe v. Stevenson Iron Min-

ing Company, reported in 136 Fed. 147. In that case it appeared that the defendant was organized for the purpose of mining iron ore, and not for the purpose of owning or operating a railroad. But it did own two parallel railroad tracks about three-quarters of a mile in length, extending from its mine out to and connecting with the main line of the Eastern Minnesota Railway Company and with a railroad yard constructed by the railway company for the mutual use and benefit of the railway company and the defendant. The defendant also owned four railway engines and a number of ore cars. The defendant used these engines and cars in connection with steam shovels to load and convey its ore from the mine to the railroad yard, employing its own railroad engineers, brakemen, switchmen and trackmen. The plaintiff was engaged as a brakeman in the operation of one of defendant's trains upon one of defendant's tracks, and was injured while so engaged through the carelessness of defendant's engineer. The case was tried in the United States Circuit Court of Duluth, Minnesota, and the trial judge instructed the jury to return a verdict in favor of the defendant upon the sole ground that the statute in question was inapplicable to the case. Plaintiff appealed, and the appellate court reversed the lower court, using, on page 149, the following language:

"The Supreme Court of Minnesota has decided that Section 2701 (being the statute in question) governs the relation of master and servant, and the liability of the former to the latter when they are engaged in the operation of a short railroad

owned and operated by a mining corporation, which is not a railroad corporation, for the sole purpose of operating its mines, and that the statute thus constructed, does not violate any provision of the Constitution of the State of Minnesota. It has held that this statute applies, not to railroads as such, but to railroad hazards, that it governs 'all persons and corporations operating a line of railroad, incident to which are the hazards and risks intended to be guarded against by the legislature,' and that the statute thus construed is not violative of the Constitution of the state."

Here the Court cites the various cases referred to in this brief, including Kline v. Minnesota Iron Company, 93 Minn. 63.

The court then say:

"The decisions of the Supreme Court have placed beyond debate the proposition that state legislation thus construed is within the police power of the state, and does not violate the constitution of the United States. Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Holden v. Hardy, 169 U. S. 366, 393, 18 Sup. Ct. 383, 42 L. Ed. 780; St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872. In deference to these decisions, the conclusion of the Circuit Court that this statute was inapplicable to the servants of the defendant who were engaged in operating its railroad cannot be sustained."

It would seem, in view of the decisions cited, that the statute in question does not in any way violate the Fourteenth Amendment to the Constitution of the United States. It may be quite true that, in constructing a new railroad, contractors may adopt ways and methods of carrying on the business, which expose certain of their employes to

dangers quite similar to what are known as "railroad hazards" and that they would not come within the scope or meaning of the statute as interpreted by the State Supreme Court. The illustration used by the trial court in its memorandum filed with the order setting aside the verdict simply tends to show what is a well known fact, that a classification of this sort cannot be wholly perfect. It is not necessary to discuss the question as to whether or not the statute would or would not cover just such cases as the trial court assumed would not be covered. If they are covered, well and good. If not, that fact does not vitiate the statute, but simply goes to show that no classification can be perfect. As was said by Justice Mitchell in Funk v. St. Paul City Railway Company, 61 Minn. 435,

"it simply shows that a classification of this sort, like everything else human, cannot be wholly perfect, and that in a class, which is marked by substantial characteristics, in varying degrees, it will often happen that those of one member of a class may scarcely differ at all from those of some member of another class. But the line must be drawn somewhere."

THE PROVISO CONTAINED IN THE STATUTE DOES NOT IN ANY WAY VITIATE THE STATUTE OR RENDER IT UNCONSTITUTIONAL AS CLAIMED BY COUNSEL FOR PLAINTIFF IN ERROR.

Counsel for plaintiff in error urged with great earnestness that, on account of the proviso, the statute is unconstitutional, because it prevents the statute becoming applicable to all persons under

like conditions, thus causing burdens to be imposed upon one employer that is not imposed upon another where both expose their employes to the same class of hazards and dangers. The language of Justice Mitchell quoted above is applicable here. But the best answer to this contention is found in the language of Justice Brown in the opinion of the Supreme Court of Minnesota in the case at bar, and found on pages 148 to 153, printed record. The court say:

"The proviso is in the nature of an exception or reservation, and serves merely to exclude from the operation of the act railroads while in course of construction, incomplete and not open to use."

And again,

"The proviso must, therefore, be held, not as indicating an intention on the part of the legislature to single out railroad corporations engaged in public traffic, and impose upon them liability for injuries caused to one servant by a fellow servant, but to establish a rule to protect employes in a hazardous and dangerous employment; and the exception of the incomplete railroad merely draws a line between the time when the act shall take effect, as to the railroads in course of construction. When fully completed and ready for operation, whether public or private enterprises, if, in their operation, servants are exposed to 'railroad hazards' the statute applies, and they are liable."

The language used by Justice Brown leaves nothing further to be said on the subject, so far as the proviso is concerned. But it may be urged further that the statute, as interpreted, is repugnant to the Fourteenth Amendment, as denying to plaintiff in error the equal protection of the laws, for the reason that the statute was passed in the exer-

cise of the police power of the state, that plaintiff in error's business is in no sense affected with a public interest, and that such a statute is not valid unless it appears that the interests of the public generally, as distinguished from those of a particular class requires such interference. This point was strenuously insisted upon by counsel for defendant in the case of Kibbe v. Stevenson Iron Mining Co., supra, and a splendid brief was presented in support of that contention. But, as was said by the appellate court in that case,

"a careful perusal of the opinions of the Supreme Court, and of those of the Supreme Court of Minnesota, has forced our minds to the conclusion that the issues of law, which he presents are not open to our consideration or determination."

Thus this court in Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, and in Minneapolis & St. Louis Ry. Co. v. Herrick, 127 U. S. 210, has settled the proposition that state legislation, such as the statute in question construed as it has been by the State Supreme Court of Minnesota, and the Supreme Court of Kansas, is within the police power of the state, is a proper exercise thereof, and does not violate the constitution of the United States. The cases of Holden v. Hardy, 169 U. S. 366, and St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, have placed beyond debate the proposition that statutes passed by the state legislatures in exercise of the police power, are not necessarily designed for the protection or welfare of the public generally, as distinguished from those of a

particular class, as employes exposed to peculiar hazards.

In the Holden case, on page 393, this Court point out the fact that the business of mining coal, of manufacturing iron has expanded and grown and reached such vast proportions that it has been found necessary with due regard to the safety and health of those engaged in them to adopt special protection against the dangers necessarily incident to these employments, and that laws have been enacted in most of the states to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. This court refers in that decision to laws or ordinances providing for fire escapes, inspection of boilers, protection of dangerous machinery against accidental contact, cleanliness and ventilation of working rooms, guarding of well holes, stairways and elevator shafts. Further attention is directed to statutes in states where mining is the principal industry, making special provisions for shoring up of dangerous walls, for ventilation shafts, means of signalling the surface, supply of fresh air, etc., and on page 394 this court say:

"These statutes have been repeatedly enforced by the courts of the several states; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional."

If such statutes are constitutional, then it is difficult to see why the statute in question should not be valid exercise of the police power of the state, when made applicable to private corporations oper-

ating railroads, and thus exposing employes to peculiar hazards. In the Holden case the statute there under consideration limited the number of working hours to eight hours per day in all underground mines, and in all smelters and ore reduction works. This court say, on page 395:

"On the principle above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metal. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal Court."

In the case, St. Louis Consolidated Coal Co. v. Illinois, supra, a statute was under consideration which provided for inspection of coal mines at the expense of the mine owners in all mines where more than five men are employed at any one time. The court say, on page 207:

"The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health and comfort, are so obviously within the police power of the state, that no citation of authorities is necessary to vindicate the general principle. Many of these cases are reviewed in Holden v. Hardy, 169 U. S. 366, in which it was held to be competent for a state legislature to limit the hours of labor, in mines and smelting works, to eight per day."

This court held that statute to be a valid exercise of the police power. Another objection to that

statute raised was that it discriminated in favor of miners or mine owners not employing more than five men at one time. But this court held that this was a species of classification that was valid and proper. The same reasoning applies to the statute in the case at bar, where the proviso suspends the operation of the statute until the road is completed, and in use for the purposes of its creation.

It is respectfully submitted that the statute in question, as interpreted by the Supreme Court of Minnesota, is not repugnant to the Fourteenth Amendment as depriving plaintiff in error of the equal protection of the laws.

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GEORGE M. NELSON,
Of Counsel.

Supreme Court of the United States.

No. 96.—October Term, 1905.

Minnesota Iron Company, Plaintiff in Error, vs. Mark M. Kline. } In Error to the Supreme Court of the State of Minnesota.

[December 18, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action for the loss of an arm by the plaintiff, the defendant in error, while repairing an engine of the defendant, through the negligence of a fellow servant. A statute of Minnesota reads as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability; *provided*, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant, while engaged in the construction of a new road, or any part thereof, not open to public travel or use." Minn. G. S. 1894, § 2701. The track on which the accident happened was a narrow gauge track, on which dump cars were run by the defendant, a mining company, for the purpose of stripping the earth from the surface of its mine. The plaintiff had a verdict which afterwards was set aside by the trial court on the ground that if the statute were construed to apply to this case it would be contrary to the Fourteenth Amendment of the Constitution of the United States. This ruling was reversed by the Supreme Court of the State and judgment was entered on the verdict. Minn. The case then was brought here.

The Supreme Court of Minnesota construed the act to apply to this case and held it constitutional when so construed. Of course, if the statute as interpreted is not within the prohibitions of the Fourteenth Amendment we do not interfere with the construction adopted by the State Court. The State Court held that the act was confined to the dangers peculiar to railroads and did not discriminate against railroad companies merely as such. It read the proviso as only exempting incomplete roads, marking the time when the statute should take effect, and not as confining it to roads intended for

public travel. Before us it was argued that when the statute was passed there were no private railroads in the State, and that, if the proviso is taken to mean what the Court said, the discrimination is senseless and unjustified, whereas if it be taken to confine the statute to public roads after public travel has begun, the distinction may be maintained. We are of a different opinion. Some time must be fixed when the law shall begin to operate and the time when the road is finished is a natural and proper time. There may be unavoidable and exceptional dangers before the track is finished and while cars are being run over it for construction purposes, and the legislature might think it proper that the servant should take the risk of these even if the negligence of a fellow servant co-operated, just as he takes the risk of the known peculiar dangers when he sets about repairing the effects of an accident. The fact that there may be also dangers like those on the finished road does not prevent the legislature from considering the situation as a whole and keeping the old rule on practical grounds until the exceptional risks come to an end. It was assumed in argument that the statute would not apply to a road like the present if it were built in aid of the construction of a public railroad which was not yet completed. We see nothing in the decision or the statute to warrant the assumption, and therefore need not discuss what the effect of such an exception would be. Of course there is no objection to legislation being confined to a peculiar and well-defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work. *Holden* v. *Hardy*, 169 U. S. 366.

It was not argued that the statute was bad as interfering unduly with freedom of contract. There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limitation. *Holden* v. *Hardy*, 169 U. S. 366, 391. The constitutionality of the law, so far as it merely does away with the exception as to the negligence of fellow servants from the general law of master and servant in the case of railroads, is not disputed. *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S. 205. The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the Fourteenth Amendment.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.